83-1981

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS and NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether language in the Comprehensive Employment and Training Act of 1973 (CETA), Pub. L. 93-203, 87 Stat. 839, 29 U.S.C. §801 *et seq.* (1973), which permits the Secretary of Labor to make adjustments in advanced or reimbursed grant payments, expressly authorizes the Secretary to recoup misexpenditures from grants by orders of cash repayment.

2. Whether, in light of the mandate in *Pennhurst State School and Hospital v. Halderman,* 452 U.S. 1 (1981), requiring legislative clarity in grant terms, a term imposing a repayment sanction can be said to be clear to the parties in 1974 through 1976 when the Secretary of Labor, in the opinion on administrative review, conceded that there was no express repayment sanction in CETA.

PARTIES BEFORE THE COURT OF APPEALS

Three petitions for review were consolidated before the Court of Appeals. The North Carolina Commission of Indian Affairs and the United States Department of Labor were the parties to one petition. The other two petitions arose from the same order of the Secretary; the parties to those petitions were the North Carolina Department of Natural Resources and Community Development, the United States Department of Labor, Wilson County, North Carolina and Wilson County Technical Institute.

An amicus curiae brief was filed in support of the petitioners' position by the National Association of Counties; the National League of Cities; the United States Conference of Mayors; the American Public Welfare Association; the National Council of Local Public Welfare Administrators; the City of Stockton, California; the County of Los Angeles, California; the County of Onslow, North Carolina; the City of Portland, Oregon; the City of Boston, Massachusetts; Broward Employment and Training Administration; the State of Maine; Franklin County, New York, Employment and Training Administration; Alameda County Training and Employment Board; the City of San Jose, California; Memphis and Shelby County, Tennessee, Consortium; the City of Bridgeport, Connecticut; the City of Camden, New Jersey; the Toledo Area Consortium; the City of Los Angeles, California; the City of Detroit, Michigan; and the State of Vermont.

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UNITED STATES DEPARTMENT OF LABOR,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, the North Carolina Commission of Indian Affairs and the North Carolina Department of Natural Resources and Community Development, respectfully urge that a writ of certiorari issue to review the opinion of the United States Court of Appeals of the Fourth Circuit rendered on January 12, 1984, in which matter petitioners' petition for rehearing and suggestion for rehearing en banc was denied on March 6, 1984.

OPINIONS BELOW

The consolidated cases arose out of two orders of the Secretary of Labor. The opinion of the Administrative Law Judge for the United States Department of Labor in *In the Matter of North Carolina Commission of Indian Affairs,* No. 81-BCA/A-20, App. at A, became the order of the Secretary of Labor on September 16, 1982, App. at B. The opinion of the Administrative Law Judge for the United States Department of Labor in *In the Matter of the State of North Carolina (North Carolina Department of Natural Resources and Community Development v. United States (Department of Labor), Grant Officer,* No. 80-BCA/CETA-7, App. at C, entered on November 19, 1982, became the order of the Secretary on December 29, 1982, pursuant to 20 C.F.R. § 676 .91(f). THe North Carolina agencies petitioned for review by the United States Court of Appeals for the Fourth Circuit under 29 U.S.C. § 817 (1978). The opinion of the United States Court of Appeals for theFourth Circuit, on the consolidated petitions, which was issued on January 12, 1984, is reported at 725 F.2d 238 (4th Cir. 1984), App. at D. The petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied on March 6, 1984. App. at E.

JURISDICTION

The judgment by the United States Court of Appeals for the Fourth Circuit was entered on January 12, 1984. App. at F. The petition for rehearing was denied on March 6, 1984. App. at E.

The jurisdiction of this honorable Court is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This matter involves the interpretation of the Comprehensive Employment and Training Act of 1973 (CETA),

Pub. L. 92-203, 87 Stat. 839, 29 U.S.C. §§ 801 *et seq.* (1973), and specifically Section 602(b), of that Act, 29 U.S.C. § 982(b), which provides in pertinent part:

> The Secretary may make such grants, contracts, or agreements, establish such procedures(subject to such policies, rules, and regulations as he may prescribe), and make such payments, in installments and in advance or by way of reimbursement, or otherwise allocate or expend funds made available under this Act, including...expenditures for construction, repairs, and capital improvements, and including necessary adjustments in payments on account of overpayments or underpayments. The Secretary may also withhold funds otherwise payable under this Act, but only in order to recover any amounts expended in the currently or immediately prior fiscal year in violation of any provision of this Act or any term or condition of assistance under this Act.

STATEMENT OF THE CASE

Two North Carolina agencies, the Commission of Indian Affairs and the Department of Natural Resources and Community Development, received separate grants from the United States Department of Labor under the Comprehensive Employment and Training Act of 1973. During the course of the grants, from 1974 to 1976, $135,644.19 was non-fraudulently misspent. In 1982, the Secretary of Labor ordered the North Carolina agencies to repay the misexpenditures in cash. App. at A, C. The Secretary conceded, during administrative review, that CETA did not expressly authorize repayment orders. ("The statutory language of CETA does not *expressly* authorize or

prohibit the Secretary from recovering misspent funds." [Emphasis in original], Order in State of North Carolina [North Carolina Department of Natural Resources and Community Development] v. United States [Department of Labor], Grant Officer, Conclusion of Law 10, App. at C.) The Secretary ordered repayment based on implied authority and common law authority to order repayment. The agencies separately and timely petitioned for review pursuant to 29 U.S.C. §817, and the petitions were consolidated.

While the petitions were pending, this Court delivered its decision in *Bell v. New Jersey*, ____ U.S. ____, 103 S. Ct. 2187 (1983), which held that the Secretary of Education had expressed authority under certain language in the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. 89-10, 79 Stat. 27, as amended, 20 U.S.C. §§ 2701 *et seq.* (1976 ed. Supp. V), to recover misexpenditures from grantees. The Department of Labor then urged, based on similar language in CETA, that CETA expressly authorized orders of cash repayment. The North Carolina agencies responded that the superficial similarity in ESEA and CETA belied substantial differences in language, legislative history and administrative construction and that the availability of an express cash repayment sanction could not have been plain to the North Carolina agencies when they entered the grants if it was not plain to the Department of Labor in 1982. The Court of Appeals for the Fourth Circuit agreed with the Department of Labor and held that CETA expressly authorized orders of cash repayment. The Court pretermitted decision on the alternative bases for repayment authority that had been urged by the Department of Labor.

REASONS FOR GRANTING CERTIORARI

I. INTRODUCTION.

This case raises an issue of great significance to the more than 500 units of state and local government that participated in the CETA programs during the period 1974 to 1978. The Department of Labor seeks to recover non-fraudulent misexpenditures made in the operation of CETA programs by orders of cash repayment from state and local treasuries. The sanction is imposed without regard to the undisputed fact that express authority to order cash repayment was not plain to the parties when entering the grants, without regard to the fact that other means of recouping misexpenditures from grantees were expressly mandated in CETA, without regard to the gravity of the errors that resulted in the misexpenditures, and without regard to the legislative history or language of CETA.

This case warrants review by this Court to resolve two critical issues in the still-emerging law of federal grants. This case is the Court's first opportunity to review the Comprehensive Employment and Training Act, but more importantly, it presents an opportunity to resolve whether particular grant language, specifically language permitting adjustments in grant payments, means the same thing in every grants statute as a matter of law. The petitioners believe that the Court of Appeals erroneously extended this Court's holding in *Bell v. New Jersey*, 103 S. Ct. 2187 (1983), to CETA, without sufficient and accurate analysis of CETA, which has significantly different language, legislative history and administrative construction than the Elementary and Secondary Education Act (ESEA). It is important not to delay consideration of this issue, as the Department of Labor has recently determined to pursue repayment vigorously and quickly to close CETA grant cases before it.

This case also presents the Court with an opportunity to review the narrow manner in which the Court of Appeals

has interpreted this Court's opinion in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981); if the opinion of the Court of Appeals is allowed to stand, the holding in *Pennhurst* will have been so narrowed as to be essentially vitiated. This Court in *Pennhurst* required that there be clarity in legislation authorizing and controlling grants, so that states could knowingly accept or reject grant terms. The meaning of the language now relied upon by the Department of Labor was not clear, even to the Department of Labor, until more than five years after the grants terminated. The opportunity for knowing acceptance of grant terms no longer exists if the Court of Appeals is correct.

The North Carolina agencies concede, for the purposes of this petition, that the funds were misspent, and further acknowledge that patterns of misapplication of grant funds cannot be condoned. Abuses in grant programs should be remedied, and material violations should be corrected. CETA provided sanctions and set out remedies. The North Carolina agencies accepted those terms when they accepted the grants, and they accept them today. What the agencies object to, and what could affect hundreds of state and local governments, is the imposition of an unanticipated and unallowable sanction, cash repayment.

The reason the form of recovery of misexpenditures makes a difference to state and local governments is that recovery through withholding is not as devastating a fiscal burden on state and local treasuries as cash repayment. This is so even if the withholding is accompanied by a requirement that the same programs be operated without federal funds; the unfunded program is necessarily operated over time and can involve the reallocation of at least some existing state or local resources and donated services. There is no greater burden than the cash repayment sanction sought against these state agencies and other state and local governments like them, particularly when the burden was wholly unanticipated.

The real issue involves a narrow but frequently repeated situation: does the Department of Labor have express authority under CETA to order cash repayment when a

state or local government grantee, in a good faith effort to operate a complex program, made misexpenditures. These particular cases involve two units of North Carolina state government, which, in administering complex and new CETA programs, spent a small portion of the grant funds, approximately 1%, incorrectly. None of the mixexpenditures involve fraud; none involve even gross negligence.

II. THE LANGUAGE, LEGISLATIVE HISTORY AND ADMINISTRATIVE CONSTRUCTION OF CETA ESTABBLISH THAT THERE WAS NO EXPRESS AUTHORITY FOR THE SECRETARY OF LABOR TO ORDER CASH REPAYMENT OF MISSPENT GRANT FUNDS AND THAT ANOTHER MEANS OF RECOVERY WAS AVAILABLE.

The Department of Labor urged, and the Court of Appeals agreed, that this Court's decision in *Bell v. New Jersey*, 103 S. Ct. 2187 (1983), which found authority to recover misexpenditures in the Elementary and Secondary Education Act, is dispositive of the issue of express repayment authority in CETA. The Court of Appeals reached its decision based on the conclusion that the language, legislative history and administrative construction of CETA were similar to that of ESEA. The assumptions of the Court of Appeals were, however, wrong, and therefore the conclusion is erroneous. There are significant differences in the language of ESEA and CETA; CETA and ESEA grew out of wholly different periods and wholly different concepts of federal-state grants; and there was no contemporaneous construction that cash repayment was authorized in CETA by the Department of Labor, as there was of ESEA by the Department of Education.

A. The language of CETA.

CETA had an intricate sanctions scheme. In the event of violations of CETA or the regulations, the Secretary of Labor could terminate a grantee's funding, operate the programs directly, suspend funding in whole or in part until

compliance is assured, withhold funds to recover misexpenditures or seek criminal penalties for fraud or willful misapplication of funds. Sections 105, 108(b), 108(d), 602(b), 611; 29 U.S.C. §§ 815, 818(b), 818(d), 982(b), 991. The Court of Appeals held that orders of cash repayment of disallowed costs were expressly authorized by language in Section 602(b), 29 U.S.C. § 982(b), permitting adjustments in payments when there was an overpayment or underpayment.

The Court of Appeals held that the adjustments provision was similar to Section 207(a)(1) of ESEA, which this Court found recognized the right of the Department of Education to recover misexpenditures, and therefore the Court of Appeals affirmed the Secretary's order of cash repayment. The North Carolina agencies assert that the only means of recouping non-fraudulent misexpenditures under CETA was withholding of future grant funds.

There are four reasons the Court of Appeals was wrong: (1) withholding was the means intended by Congress for recoupment of misexpenditures; (2) adjustments in payments under CETA was not a sanction to recover misexpenditures; (3) the placement of the adjustments language in the 1978 CETA Amendments indicates clearly that an adjustment in payments was a technical correction in advances and not a sanction; and (4) the section in CETA that contained the adjustments in payments provision as well as the withholding provision may not be construed in a manner that renders any portion of the section redundant.

1. Withholding was the means intended by Congress for recoupment of misexpenditures.

Recovery of misexpenditures is only mentioned once in CETA; it is mentioned in relation to withholding future grant funds, a form of offset. In CETA, withholding is the recoupment means chosen by Congress. In ESEA, withholding is not a means of recoupment at all.

This Court disparaged withholding as a means of recoupment under ESEA, in *Bell v. New Jersey*, 103 S. Ct. at 2193 n.8, because, the Court concluded, Congress could not have intended a remedy that would penalize beneficiaries of ESEA funds by reduction of services during withholding on account of a governmental misuse of funds. But the subsequent legislative history of CETA indicates that Congress meant withholding when it said withholding in CETA.

The Secretary of Labor had enlarged the withholding remedy in its 1975 regulations, 29 C.F.R. § 98.15, to include a requirement that during withholding the grantee must conduct CETA activities without federal support. This regulatory provision would have assuaged this Court's concern in *Bell v. New Jersey*, 103 S. Ct. at 2193 n.8. But instead of affirming the Secretary's interpretation in the 1978 Amendments to CETA, Congress specifically rejected the expansion. The 1978 version of the withholding provision, Section 106(g), 29 U.S.C. § 816(g), limits the instances in which grantees may be required to operate programs during withholding to instances in which there has been fraud or abuse. In other instances, such as in this case, withholding would not be accompanied by a requirement to operate the programs without CETA funds. Withholding is unequivocally the remedy selected by Congress.

2. Adjustments in payments under CETA was not a sanction to recover misexpenditures.

Adjustments in payments in CETA had a particular meaning: it was a technical correction in an advance to account for the fact that expenditures are usually at least somewhat larger or smaller than anticipated when an advance is requested. The meaning was so well-understood that there is very little reference to it in the

technical assistance information provided to grantees by the Department of Labor. The Forms Preparation Handbook, ET Handbook No. 311, provided by the Department of Labor to its grantees does acknowledge, in instructions for requests for advances, that "[r]eturn/refund of unneeded advances will require a decrease adjustment to disbursements for the amount of refund."

The language of the adjustment provisions of ESEA and CETA also have a material difference. This Court found it critical that the adjustments provision of ESEA referred to funds that the States were "eligible" to receive. *Bell v. New Jersey*, 103 S. Ct. at 2193 n.8. Since the States apparently were not eligible to receive and expend ESEA funds in the manner in which they did, the Secretary of Education could adjust the payments accordingly. CETA does not have similar language; the adjustments provision relates only to overpayments or underpayments in advances and has no relation to eligibility for funding.

3. The placement of the adjustments provision in the 1978 CETA Amendments recognizes the technical, rather than remedial, function of the provision.

Adjustments in payments was always a technical correction in payments under CETA and not a sanction, but that fact was made especially clear in 1978. When Congress made substantial changes to CETA in 1978, Comprehensive Employment and Training Act Amendments of 1978 (1978 CETA Amendments), Pub. L. 95-524, 92 Stat. 1909, 29 U.S.C. §§ 801 *et seq.* (1978), both the adjustments in payments language and the withholding to recover language were retained. Where they were retained, however, gives some insight into what Congress believed the provisions meant.

The adjustments in payments language was retained with the ministerial functions of the Secretary in Section 126, 29

U.S.C. § 828, while the provision authorizing withholding to recover misexpenditures was moved to the "Complaints and Sanctions" section, Section 106, 29 U.S.C. § 816. Obviously, if adjustments in payments were intended as sanctions, as means of recovering funds expended in violation of this act, the adjustments language would have moved with withholding to Section 106. An adjustment was not a sanction for misexpenditures.

4. The section in CETA that contained the adjustments in payments provision as well as the withholding provision may not be construed in a manner that renders any portion of the section redundant.

Statutes must be construed so that every provision is operational. *Colautti v. Franklin,* 439 U.S. 379, 392 (1983). If adjustments in payments did, in fact, authorize recoupment of misexpenditures, that recoupment could clearly be accomplished by withholding. *Cf. Bell v. New Jersey,* 103 S. Ct. at 2193 nn.4, 5. Even the Senate Report on ESEA recognizes that an adjustment could be effected by withholding of or reduction in future payments: "[A]ny excess [payment] would have to be . . . taken into account in making subsequent payments to the State." S. Rep. No. 146, 89th Cong., 1st Sess. 14 (1965), *quoted* in *Bell v. New Jersey,* 103 S. Ct. at 2193. If the adjustments language in CETA permitted recovery of misexpenditures by making "adjustments in payments" (which would include withholding future grant funds), why would Congress add the "Secretary may also withhold"? And why would there be a two year limitation on withholding to recover misexpenditures under the last sentence of Section 602(b) and no limitation on recoveries under the adjustments language in the previous sentence? The reading suggested by the Department of Labor would impermissibly render the withholding authority "redundant or largely superfluous," *Colautti v. Franklin,* 439 U.S. at 392, and the two year restriction on withholding meaningless.

The response of the Court of Appeals to the problem of redundancy in Section 602(b) is to suggest that withholding also existed under ESEA and was apparently no problem for this Court in *Bell*. But the Court of Appeals has made the same mistake with regard to "withholding" as it made with regard to "adjustments". The fact that Congress used the same word in two acts does not indicate that it meant the same thing; withholding in ESEA is not the same as withholding in CETA.

Section 146 of ESEA, 20 U.S.C. § 241j, uses the word "withholding" to describe a sanction available to the Secretary of Education. The Secretary of Education is permitted to withhold a grantee's funds when he believes the grantee is not complying with ESEA, and he can continue to withhold the funds until he is assured that the grantee will comply with ESEA. That sanction is not withholding to recover misexpenditures as permitted by Section 602(b) of CETA. That sanction is, rather, the same sanction permitted the Secretary of Labor under Section 108(d) of CETA, 29 U.S.C. § 818(d). Under Section 108(d), the Secretary of Labor may "suspend" a grantee's funds when he believes the grantee is not complying with CETA, and, again, he cannot continue funding until he is assured that the grantee will comply with CETA.

Neither the withholding provision of ESEA nor the suspension of funding provision of CETA has any relation to recovery of misexpenditures. In either case, the interruption in funding ceases when, and not until, assurance of compliance. In contrast, under the withholding to recover provision in CETA, the Secretary of Labor may withhold funds to recoup disallowed costs without regard to whether there is present compliance by the grantee.

The error made by the Court of Appeals underlines the potential for inaccurate analogies in the area of grants law. Since the law of grants is relatively young, particular words may not have acquired uniform interpretation. The parties

to a grant understand the terms in the context of the particular statute; what the parties to another grant under another statute understand is not presumptively probative. Here, for example, "withholding" in ESEA does not mean the same thing as "withholding"in CETA, and "adjustments in payments" in ESEA does not mean the same thing as "adjustments in payments" in CETA.

B. The legislative history of CETA.

The Court of Appeals concluded that the legislative history of CETA was similar to the legislative history of ESEA and that, therefore, the recovery authority in CETA was similar to that in ESEA. Aside from the fact that both statutes involve grants from the federal government to the states, very little is similar in the legislative history of the two acts. ESEA was enacted in 1965, an era of paternalism in the manner in which the federal government dealt with the states. In contrast, CETA was enacted in 1973, at what was then the height of the federal revenue-sharing boom. In fact, CETA was considered by some as the first real categorical revenue-sharing act. The political philosophies that were prominent at those times underlie Congressional expectation about such issues as the manner of recoupment of misexpenditures.

There is, frankly, little explication of the adjustments in payments language in the legislative history. Two things are clear, however: (1) Congress did not adopt explicit repayment language, although explicit repayment language was available to it in other manpower acts and proposals; and (2) the Department of Labor, in describing the sanctions in the proposed bills from which CETA emerged, never mentioned repayment and never identified the adjustments language.

1. Congress identified withholding as the means of recovering misexpenditures under CETA, although remedial provisions authorizing cash repayment of misexpenditures had been proposed in similar manpower bills.

The remedial provisions in CETA are a product of a *variety of statutory schemes* and proposed statutory schemes that preceded it. The Court of Appeals concluded that none of the predecessor manpower acts contained remedial language. That is patently erroneous. The Manpower Development Training Act of 1962 (MDTA), Pub. L. 87-415, 76 Stat. 23, 42 U.S.C. §§ 4871 *et seq.* (1966), contained two provisions mandating that the Secretary include language in manpower contracts that would "protect the United States against loss and insure the proper application of funds." Section 203(f), 206(b); 29 U.S.C. §§ 2583(f), 2586(b). (The MDTA cases cited by the Court of Appeals, in which there were repayment orders, rely on those contracts.) The Economic Opportunity Act of 1964 (EOA), Pub. L. 88-452, 78 Stat. 508, 42 U.S.C. §§ 4871 *et seq.* (1976), was passed about the same time as ESEA. Section 243(c) of EOA, 42 U.S.C. § 2835(c), "Fiscal Responsibility and Audit", provided specifically that "[i]n the event of disallowance, the director [of OEO] may seek recovery of funds by appropriate means including court action or commensurate increase in the required non-federal share of the costs of any grant or contract." Congress knew well how to authorize repayment in manpower acts.

Beginning in 1969, there was a concerted effort in Congress and in the administration to enact comprehensive manpower legislation. Between the end of 1969 and the passage of CETA in December 1973, more than forty manpower acts were proposed. There were a wide variety of remedial provisions in bills that were introduced. Several remedial provisions were common: provision for termination of grants in the event of noncompliance, authority of the Secretary of Labor to take over programs where there was noncompliance, withholding of or reduction of funds until there was assurance of compliance, withholding to recover prior misexpenditures, mandates for the Secretary

of Labor to include contractual language in grants to protect the United States against loss, mandates for the Secretary of Labor to promulgate regulations he felt necessary to promote effective use of funds, and criminal sanctions for fraud or criminal misapplication of funds. Less common were provisions calling for repayment of misexpenditures.

During the period 1969 through 1973, when CETA was passed, Congress passed three comprehensive manpower bills, although one was vetoed by President Nixon for a reason unrelated to its remedial structure. All three bills contained the same section, permitting the Secretary of Labor to make contracts, to make payments in advance or by reimbursement and to make adjustments in payments on account of overpayments or underpayments. In all three sections, the Secretary was also authorized to withhold future funds to recover misexpenditures. A comprehensive manpower bill containing a repayment provision was never even reported out of committee during this time.

The most prominent repayment provision was in President Nixon's proposed Manpower Revenue-Sharing Act of 1971, which was introduced in March 1971 and was still under consideration by Congress and actively supported by the Department of Labor in 1973 when CETA was passed. It contained explicit repayment language. Proposed section 105, "Recovery of Funds", provided that recovery could occur administratively by withholding or civilly by actions for repayment or appropriate relief. *Manpower Report of the President—April 1971* at 190. But Congress rejected the Manpower Revenue-Sharing Act and with it, the repayment sanction suggested by the President.

In 1970, Congress passed, but the President vetoed, the first manpower bill with an adjustments in payments provision and a withholding provision. Although it is not the same bill as CETA, it does have the precise section at issue

in this case. And in the legislative history, there is a rare statement concerning the sanctions available for violations. Representative O'Hara one of the drafters of the compromise bill in the House, described the remedy if a public employer (who was the grantee under this bill) violated provisions of the public service employment title:

> If the employer fails to abide by agreements into which he has freely entered [with the Department of Labor], he may and indeed shall have the Federal share of the costs of subsequent agreements reduced in an appropriate amount.

116 Cong. Rec. 37,691 (1970). Representative O'Hara does not mention repayment, although the bill contains adjustments in payments language; he mentions only reduction in future grants, which is withholding. That same language, and that same understanding of the meaning of the language, was approved and repeated in the Emergency Employment Act in 1971 and CETA in 1973.

The Emergency Employment Act of 1971 (EEA), Pub. L. 92-54, 85 Stat. 146, 42 U.S.C. §§ 2701 *et seq.* (1971), was the first major manpower legislation since MDTA and EOA in 1962 and 1964. In EEA, Congress was responsive to a number of issues raised in the President's proposed bill. It permitted funding by advances, EEA, § 12(e), Proposed Manpower Revenue-Sharing Act, § 403; it allowed adjustments in advances to correct for overpayments or underpayments, EEA, § 12(e), proposed Manpower Revenue-Sharing Act, § 403(b) ("Advance payments.... unearned at the close of business December 31, 1971, shall either be returned promptly...or offset against the first shared revenues to which the same unit of government becomes entitled under this Act."); it authorized administrative orders for recoupment of misexpenditures by withholding, EEA, § 12(e), proposed Manpower Revenue-Sharing Act, § 105(a)(2). What Congress did not do in EEA was adopt the provision of the proposed Manpower Revenue-Sharing Act that permitted actions for repayment

of misexpenditures. The remedy Congress elected was the same remedy Representative O'Hara had described a year before.

The same provision and the same remedy were approved in CETA. The import of the adjustments language had not changed in the three years since Representative O'Hara had spoken. When Congressmen took the floor in the debates on CETA and called for accountability, they had the same enforcement methods available under CETA that Representative O'Hara had described. And when, in the debates on the 1978 CETA Amendments, Congressmen affirmed that recovery had occurred under CETA, they were acknowledging that the enforcement method, withholding to recover misexpenditures, had been utilized.

2. The Department of Labor did not identify repayment as a means of recovery for violations under CETA or the adjustments language as a means of repayment under CETA.

When the conference committee met prior to the passage of CETA, there was no issue as to the adjustments in payments language or the withholding provision. Both the Job Training and Community Services Act, S. 1559, 92d Cong., 2d Sess., and the Comprehensive Manpower Act of 1973, H.R. 11010, 92d Cong., 2d Sess., contained the same language. In hearings on H.R. 11010, William Kolberg, the Assistant Secretary for Manpower, the top official manpower in the Department of Labor, presented the position of the Administration on the bill:

> We do feel, however, that if a prime sponsor violates or has failed to comply with any provison of the bill, including any gross misfeasance in the conduct of its responsibilities, the Secretary should have the ultimate authority to terminate financial assistance under the bill in whole or in

> part. The balance of the unused funds should revert to the Secretary .... The Federal Government should not be hovering over the prime sponsor. In fact, the matter needs to be substantial and important before the Federal Government imposes its judgment.

Comprehensive Manpower Act of 1973: Hearings Before the Select Committee on Labor of the House Committee on Education and Labor, 93d Cong., 1st Sess. 81-82 (1973). Assistant Secretary Kolberg did not mention repayment for violations.

Repayment was no more of an issue to Assistant Secretary Kolberg than it had been to Representative O'Hara or than it was to Jack Conway. Mr. Conway was the representative of a community action agency who testified at a Senate hearing on an earlier manpower proposal with the same adjustments and withholding language. His contemporaneous understandng was that "the Secretary [of Labor] can witnhold funds from a State when in his judgment the State has not performed well in carrying out its various manpower programs...." Manpower Development and Training Legislation, 1970: Hearings Before the Subcommittee on Employment, Manpower and Poverty of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st and 2d Sess. 150 (1970). Mr. Conway was not concerned with repayment, and Mr. Kolberg did not mention repayment because the adjustments language does not authorize repayment.

3. Subsequent legislative history establishes that Congress believed the Department of Labor was recovering misspent CETA funds but could not have believed that the Secretary of Labor was authorized to order cash repayment of misexpenditures.

The most probative sections of the subsequent legislative history are the portions of the floor debate in the House and

the Senate where a specific repayment amendment is offered. The amendment, creating Section 106(d)(2), 29 U.S.C. § 816(d)(2), requires the Secretary to order repayment for certain violations in public service programs unless he finds cause not to order repayment. Representative Butler, introducing the amendment in the House, states,"Existing law lacks sufficient penalties" for violations and that he is offering an amendment to require prime sponsors to "refund" costs associated with violations. 125 Cong. Rec. 25,180 (1978). Senator Schweiker, introducing the amendment in the Senate, says, "I want to make clear...that this amendment will have no retrospective effect." 125 Cong. Rec. 27,804 (1978). Those statements, by sponsors of a repayment amendment, would make absolutely no sense if the adjustments in payments language in the 1973 CETA already authorized repayment orders.

The Department of Labor has based its argument that Congress believed cash repayments were being made and were authorized under CETA on two elements in the debates on the 1978 CETA Amendments. The first is the fact that the Department of Labor had indisputably recovered funds under CETA. But since withheld funds were "recovered" under the terms of Section 602(b) of CETA, that indisputable fact is not very probative. The second is the fact that the City of Chicago had "repaid" the Department of Labor almost one million dollars in misexpenditures. But the repayment by Chicago, which was a matter of settlement between the parties rather than an order of the Secretary, was made on palatable terms for Chicago. The Secretary of Labor could have terminated all CETA funds to Chicago. Under the terms of the settlement, the cash repayment went into a fund from which Chicago alone could draw for additional CETA programs; the "repayment" had the net effect of withholding with a requirement to operate the programs with local funds.

C. The administrative construction of CETA.

The foremost administrative constructin of CETA that is relevant to whether there is express authority to order cash repayments in CETA is the statement adopted by the Secretary in the opinion in the case of the Department of Natural Resources and Community Development, App. at C, that, "The statutory language of CETA does not *expressly* authorize or prohibit the Secretary from recoverning misspent funds." (Emphasis in original). Prior to the release of this Court's opinion in *Bell*, the Department of Labor never once took the position that repayment in authority was express in CETA, much less that it was expressed in the adjustments in payments language.

The administrative construction of CETA differs substantially from the administrative construction of ESEA, which this Court found in *Bell* supported the position of the Secretary that recovery was authorized. The administrative practice cited by the Court of Appeals as indicating a practice of ordering repayment without a specific repayment language was not even administrative practice under CETA, or even under EEA, which had similar recoupment by withholding language. It was adminstrative practice under MDTA and EOA, which, it has been pointed out, contain recovery language or mandate contractual recovery language.

To establish a consistent administrative construction by the Department of Education that repayment was authorized under ESEA, this Court cited three instances of orders of repayment by the Secretary of Education during the period before repayment was authorized in amendments to ESEA; this Court referred to forty-four audit files, a contemporaneous Congressional report and three scholarly publications referring to the practice of recovering misspent ESEA funds. None of that is present in CETA.

There is little guidance as to the recoupment provisions

in CETA in the contemporaneous analysis of the Act, and what analysis there is supports the position of the North Carolina agencies. In the Manpower Information Service, a biweekly review of manpower-related issues, a contemporaneous analysis refers to the sanctions available for violations of CETA:

> The provision in the law which permits the federal government to withhold all or a part of a prime sponsor's funds, in case of noncompliance with the law and with the regulations, gives the federal government the necessary flexibility and clout in enforcing adherence to national goals and standards.

"MIS Analysis: 'CETA' Regulations Enhance Potential for Delivery of Manpower Programs," 5 Manpower Information Service 304 (April 10, 1974).

Under CETA there are repeated instances in which the Department of Labor has ordered withholding or suspension of funding. *In re San Diego Regional Employment and Training Consortium,* No. 78-CETA-102 (March 22, 1978); *Greater California Educational Project, Inc.*, No. 78-CETA-106 (December 23, 1977). Even in cases of particularly egregious conduct, such as in the *Greater California* case, there were no orders of cash repayment.

There is no mention of cash repayments in the regulations, the volumes of technical assistance guides, the field memoranda, the prime sponsor instructions and the correspondence with which the Department of Labor provided its grantees. The evidence at the hearing for the Department of Natural Resources and Community Development was that repayment was not mentioned in any training session by or communication from the Department of Labor. Orders of repayment were simply not in the administrative practice under CETA until after the inclusion of a repayment sanction in the 1978 Amendments to CETA.

III. THE MANDATE OF *PENNHURST*, WHICH REQUIRES LEGISLATIVE CLARITY IN GRANT TERMS, CANNOT HAVE BEEN SATISFIED WITH REGARD TO REPAYMENT ORDERS UNDER CETA WHEN THE DEPARTMENT OF LABOR ITSELF STATED IN 1982 THAT THE 1973 CETA DID NOT INCLUDE AN EXPRESS RIGHT TO ORDER REPAYMENT.

In the period of 1974 through 1978, hundreds of state and local governments entered CETA grant agreements with the Department of Labor. These governmental units believed they understood the terms of the grants and were "cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman,* 451 U.S. at 17. The Department of Labor also understood the grant terms. The Department of Labor understood that the grant terms did not expressly authorize the Secretary to order cash repayment. The Department of Labor understood that in 1974, and in 1978, and in 1982. But in 1983, the Department of labor came before the Court of Appeals and said that CETA expressly authorized the Secretary to order cash repayment and that is a term of the grants that all the state and local government grantees should have understood all along.

The position of the Department of Labor would simply be untenable if it did not now have the approval of the Court of Appeals for the Fourth Circuit. There is no clue in the opinion below as to the analysis undertaken on this point by the Court of Appeals. The court simply referred to this Court's opinion in *Bell v. New Jersey,* and concluded that if adjustments in payments clearly expressed the Secretary of Education's authority in ESEA, it clearly expressed the Secretary of Labor's authority in CETA.

In *Bell,* this Court determined that the adjustments in payments provision constituted "plain language" and that

the imposition of liability under that language was "sufficiently clear." 103 S. Ct. at 2197 n.17. This Court was addressing, and resolving, the potential problem caused by *Pennhurst State School* and *Hospital v. Halderman,* 451 U.S. 1 (1981). This Court affirmed that *Pennhurst* requires that "Congress act 'unambiguously' when it intends to impose a condition on the grant of federal money," and found that "ESEA meets *Pennhurst's* requirement of legislative clarity." 103 S.Ct. at 2197 n.17.

But what of CETA and the conclusion of the Court of Appeals? Can the Deprtment of labor really suggest that the adjustment language unambiguously authorized repayment orders when the Department of Labor never once recognized it as a basis for ordering repayment until enlightened by the opinion in *Bell*?

The Department of Labor's position in 1982 was extremely clear: "The statutory language of CETA does not *expressly* authorize or prohibit the Secretary from recovering misspent funds." App. at C. The Court of Appeals does not identify this specific language, and by failing to appreciate the import of this concession by the Department of Labor, the court misapprehends, at least in part, the North Carolina agencies' position. The position, simply stated, is that the Department of Labor did not believe that CETA expressly authorized repayment, so any supposed express authorization could not possibly have been clear or unambiguous. The "terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant," *Pennhurst,* 451 U.S. at 17, and, if the adjustments provision authorized repayment, it simply was not clear.

The critical question is not whether the grant terms in the legislation are clear to the Court on review, but whether they were clear to the parties when they entered the grant. There is no question that the gloss the Department of Labor

now gives the adjustments in payments language was not clear to the parties in this case even as late as 1982. The latest grant at issue in this case ended in 1977. Since the adjustments in payments language, at the very least, was unclear, the North Carolina agencies, and the hundreds of other state and local government grantees, could not have knowingly accepted the present proposed gloss on the language.

What the Department of Labor and the Court of Appeals do say about *Pennhurst* is that it is inapposite because *Pennhurst* involved an "unexpected condition" of future funding and is, therefore, distinguishable from this case. But repayment in this case was obviously intended as a condition of future funding. In fact, during administrative review, the Secretary based his authority to order repayment on a regulation that permitted him to impose conditions on future CETA funding. 29 C.F.R. 98.48(f)(1974). The repayment order was a condition of future funding that was unexpected and burdensome.

The difference between *Pennhurst* and this case, then, is, at most, what is described as the affirmative nature of the obligation in *Pennhurst*. The Department of Labor reads *Pennhurst* too narrowly; this Court distinquished between merely precatory terms and terms that imposed fiscal conditions on funding. *Pennhurst,* 451 U.S. at 18. This Court required legislative clarity in statutory grant terms when the terms could impose a fiscal burden on the state or local government grantee. Orders of cash repayment are undeniably a greater fiscal burden than the withholding of grant funds. This Court eschewed ambiguous affirmative obligations "since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst,* 451 U.S. at 17. This Court was obviously less concerned with the label attached to the condition than with its practical effect. The practical effect of a holding imposing this new and unexpected financial

obligation under CETA would be massive. The Department of Labor's reading of *Pennhurst* ignores the reason this Court abhorred the imposition of an unexpected affirmative condition in *Pennhurst;* the same unanticipated financial burden on the states arises in this case.

IV. CONCLUSION

This case warrants review by this Court. The question of whether the Comprehensive Employment and Training Act expressly authorizes the Secretary of Labor to order hundreds of state and local governments to repay CETA misexpenditures is of sufficiently national interest that it requires this Court's review. Furthermore, the opinion of the Court of Appeals for the Fourth Circuit has erroneously expanded this Court's ruling in *Bell v. New Jersey*, 103 S. Ct. 2187 (1983), which explicated language in ESEA, to a wholly different grant statute with different language, legislative history and administrative construction.

The holding of the Court of Appeals conflicts with this Court's opinion in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The Court of Appeals has adopted a view of "legislative clarity" that vitiates this Court's mandate in *Pennhurst*. If the opinion is allowed to stand, unreviewed, there is no longer any requirement under *Pennhurst* for voluntary and knowing acceptance of grant terms by state and local governments.

The petitioners pray that this honorable Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Attorney General

ELIZABETH ANANIA
Assistant Attorney General
Counsel for Petitioners
NORTH CAROLINA COMMISSION
OF INDIAN AFFAIRS and
NORTH CAROLINA DEPARTMENT OF
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APPENDICES

INDEX TO APPENDIX

APPENDIX A

Opinion of Administrative Law Judge in
In the Matter of
North Carolina Commission of Indian Affairs
No. 81-BCA/A-20
Dated: July 29, 1982

In the Matter of:

NORTH CAROLINA COMMISSION
OF INDIAN AFFAIRS Case No. 81-BCA/A-20

Prime Sponsor

Theresa Ball
Office of the Solicitor
U.S. Department of Labor

Grayson G. Kelley
Assistant Attorney General
State of North Carolina

Before: GLENN ROBERT LAWRENCE
Administrative Law Judge

STATEMENT OF THE CASE

This proceeding arises under the Comprehensive Employment Training Act of 1973, 29 U.S.C. sec. 801 *et seq.* (hereinafter referred to as the Act or CETA), and the regulations issued pursuant thereto, including 20 C.F.R. 676.88. The dispute arises from a final determination issued September 25, 1980, referencing Audit No. 11-6-0382-C-257 and Grant Nos. 99-5-070-30-36 and 99-6-070-30-40. In the determination questioned costs of § 34,147.19 were disallowed. From that determination the prime sponsor filed a timely appeal before this Office. The parties have stipulated this case may be decided on the written record. From the briefs filed by both parties and the record the following decision is rendered:

FINDING OF FACT

Stipulations

The parties have stipulated and I so find:

1. A final determination was issued on September 25, 1980, concerning Audit No. 11-6-382-C-257 of Grant Nos. 99-5-070-30-36 and 99-6-070-30-40. In this final determination questioned costs of $34,147.19 were disallowed. A copy of this final determination is contained in the administrative file at Pg. A2a.

2. By letter dated October 31, 1980 and filed with the Office of the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C., the prime sponsor, North Carolina Commission or Indian Affairs, filed a request for hearing regarding the findings of the final determination. The commission received a copy of the final determination on October 1, 1980.

3. The contents of the administrative file prepared by the Grant Officer and heretofore filed with the Court including exhibits A through E therein, is deemed admissible and submitted to the Court as Joint Exhibit No. 1.

4. OMS Circular A-87 (now FMC-74-40) is to be admitted as the Exhibit No. 2.

5. The firm of O'Neal & Metcalf, Certified Public Accountants, Atlanta, Georgia, examined and audited the financial and related program records of the CETA grants awarded to North Carolina Commission of Indian Affairs. The audits CETA grants were Grant No. 99-5-070-30-36 covering a period November 1, 1974 through April 30, 1976 and Grant No. 99-5-070-30-40, covering the period July 1, 1975 through June 30, 1976. The period covered by this audit and the period for which the financial and related program records were examined is the period Novem 1, 1974 through December 31, 1975. This audit report is contained in the administrative file as exhibit B thereto and is Audit Report No. 11-5-382-C-257.

6. The basic grant documents for Grant No. 99-5-070-30-36 are contained in the Administrative file as Section No. C, 8. The basic grant documents for Grant No. 99-6-070-30-40 are contained in the administrative file as Section No. D, 10.

7. The aforementioned grants were provided under the provisions of Title III of the Comprehensive Employment & Training Act to North Carolina Commission of Indian Affairs as grantee and prime sponsor.

8. By letter dated February 13, 1976, the public accounting firm of O'Neal & Metcalf transmitted to the Regional Administrator of Audit, Office of Regional Audit, U.S. Department of Labor, in Atlanta, Georgia, the audit and findings thereof (Administrative file, Exhibit D). On April 20, 1976, a copy of the interim audit report was transmitted to the North Carolina Commission of Indian Affairs. At the same time, the audit report was submitted

to Sanford Cohn, Chief, Division of Contracting Services (Administrative file, Exhibit B-6).

9. On May 6, 1976, the aforementioned audit report was submitted by Sanford Cohn, Chief, Division of Contracting Services, to Alexander MacNabb, Director, Division of Indian and Native American Programs (DINAP). On June 1, 1977, DINAP submitted its comments on the aforementioned audit report.

10. By letter dated June 4, 1976, the North Carolina Commission of Indian Affairs submitted its response to the audit report (Administrative file Exhibit B-5).

11. The Grant Officer's initial determination was forwarded to the North Carolina Commission of Indian Affairs by letter dated July 22, 1980 (Administrative file, Exhibit A3b).

12. By letter dated August 1, 1980, W. Aimes Christopher, CETA Director, North Carolina Department of Administration, responded to the initial determination (Administrative file, Exhibit A3).

13. By letter dated August 25, 1980, Jerry Berkelhammer, Assistant Director, North Carolina Department of Administration, also responded to the initial determination (Administrative file, Exhibit A3a).

14. The following facts are stipulated with regard to the costs disallowed in the final determination relating to Grant No. 99-5-070-30-36:

a. The Grant Officer disallowed $4,353 paid to the state treasurer for the salary and fringe benefits of Lois Maynard, Accounting Clerk II, employee of the

Department of Administration. This expenditure covered the period from January 1, 1975 through June 30, 1975. Lois Maynard maintained all financial records under Grant No. 99-5-070-30-36 during this period but she also maintained financial records for other federal grants. Her entire salary and applicable fringe benefits were charged to the aforementioned grant and were not pro-rated to other federal grants.

b. Stipend payments totaling $950 made in November and December, 1975 to two participants were disallowed. The first were a stipend payments made to Charlotte Goins for the months of September and October, 1975, totaling $400. Charlotte Goins is a sister of Thelma Pruitt, Manpower Specialist, who was employed on the staff of the North Carolina Commission of Indian Affairs during the entire year of 1975 and whose salary was paid during that time out of grant funds. Stipend payments totaling $550 were made to Herbert Richardson, Jr., during the months of September and November, 1975. Herbert Richardson, Jr., is the son of Herbert Richardson, Manpower Developer, who was employed on the staff of the North Carolina Commission of Indian Affairs from January 6, 1975 through at least the end of 1975. The salary of Herbert Richardson was paid out of grant funds. Charlotte Goins and Herbert Richardson, Jr. were participants at the time they received these stipends. Both Thelma Pruitts and Herbert Richardson were employed during 1975 in administrative capacities.

c. Under the provisions of modification No. to

grant No. 99-5-070-30-36 (Administrative file, Exhibit C-70, the North Carolina Commission of Indian Affairs conducted a summer program to provide work and training experience for 800 Indian young people. The program was to serve youths between the ages of 14 and 22 in named counties (Administrative file, Exhibit C-7). The individuals listed on Schedule D-5 of the interim audit report were ineligible under the eligibility requirements listed at 20 CFR §97.15 (a)(a) and (d) (1975). The individuals listed on Schedule D-5 of the audit did not meet the eligibility requirements of this regulation.

d. Linda A. Jacobs was overpaid $134.40 due to duplicate time sheets being submitted during the period August 11-22 and June 30 through July 11, 1975.

e. Terry Brayboy is the son of Mary E. Brayboy, Manpower Developer, who was employed on the staff of the North Carolina Commission of Indian Affairs at all times in 1975 after January 12 of that year. Mary E. Brayboy's salary during 1975 was paid out of grant funds. Terry Brayboy was employed as a participant during 1975.

15. The following facts are stipulated with regard to the costs disallowed in the final determination relating to Grant No. 99-6-070-30-40:

a. Dennis Patrick, Manpower Specialist, was employed in an administrative capacity by the North Carolina Commission of Indian Affairs during the year 1975. Mr. Patrick resigned from his staff posi-

tion on October 14, 1975. He was, however, paid from funds under this grant for the entire month of October, 1975. Wages and Fringe benefits paid for the period after his resignation amounted to $465.93.

b. On December 11, 1975, the Prime Sponsor made a payment to the Department of Administration in the amount of $13,983.62. This disbursement was for the salaries and fringe benefits of Lois Maynard, Accounting Clerk II, Mary Ennis, Personnel Clerk, and Linda Smith, Personnel clerk, all employees of the Department of Administration. This expenditure covered the period July 1, 1975 through June 30, 1976. These employees worked on several federal grants and other Department of Administration duties during this period. However, their entire salaries and applicable fringe benefits were charged to Grant No. 99-6-070-34-40 and were not pro-rated to other federal grants of Department of Administration budget.

c. Michael W. Bledsole is the son of Vilona Bledsole who was employed on the staff of the North Carolina Commission of Indian Affairs in an administrative capacity as Manpower Developer from January 6, 1975 through at least December 31, 1975. She was paid a salary out of grant funds from Grant No. 99-6-070-30-40 during this period. Michael Bledsole was a participant and was paid out of funds of grant No. 99-6-070-30-40 during this time. The wages and fringe benefits paid to him from these grant funds during this period was $91.98.

CONCLUSION OF LAW

The prime sponsor's argument is that the government should be estopped from claiming the disallowed costs inasmuch as it failed to follow up the audit questioning the costs for over four issue was closed and the records destroyed to its detriment. Without the records, it is contended that the Commission is now unable to respond in any way to the disallowed items. It mainly cites for this argument cases which allowed estopped to be asserted against the United States: *United States v. Georgia Pacific Company,* 421 F.2d 92 (9th Cir. 1970) and *United States v. Lazy F. C. Ranch,* 486 F.2d 985 (9th Cir. 1973).

I disagree that the cases cited apply. Review of the facts here show that this is *not* one of those exceptional situations where the Government is estopped to make a claim. Furthermore, other guiding law clearly enables the Government to recover notwithstanding what would appear to be an inordinate delay.

In *Georgia,* cited supra, the party relied to its detriment on Government acts. Georgia spent $350,000 beginning in 1956 in an intensive forest management program. It maintained a 300 mile road and the Government would get the direct benefits of all the work Georgia performed. Similarly in *Lazy,* cited supra, the Government received the direct benefits of a contract and the partners lost to its detriment as much profit from not farming as they received in Government payment. Additionally the Government there, affirmatively gave the defendant the wrong advice which it acted upon to its detriment.

The CETA program here provided funds to the Com-

mission to finance programs that would build work skills of an identified class of residents-obviously in need. As the result of the successful completion of the program, direct benefits would flow to the state of the sponsor, and only indirect benefits would be received by the United States from the expenditures. In the cases cited by the sponsor unlike the instant case, the benefits for the most part flowed directly to the United States and the detriment by the debtor was a form of expenditure of funds or other expenses. I don't see the destruction of its accounting papers here as an act to the sponsor's detriment in the meaning of the extoppel cases. Rather it is merely an improvident and unbusinesslike act. This is especially so considering there was then an outstanding audit showing a substantial amount of questioned costs.

Further, I agree with the Government that the prime sponsor has not showed it was prejudiced citing *Gruca v. United Steel Corporation,* 495 F.2d (3rd Cir. 1974). The prime sponsor's destruction of its papers does not now prevent it from asserting oral defenses and offering other proof. For instance the nepotism claims and the contention that money was spent for the wrong grants could clearly be the subject of testimony and proof notwithstanding the destruction of any records. That the Commission has seen fit not to mount a defense and provide proof on items does not create the inference that the destroyed papers would have proved its case. Rather the inference is just the reverse.

Additionally, the sponsor seeks to prejudice the Government's claim by the mere passage of time. However the cases are abundant and authoritative that such a lapse of time should not prejudice the Government's rights. Along those lines, it is well settled that laches may not be asserted against the United States as a defense to an action instituted in its sovereign capacity to enforce a public right or protect a public interest. *United States v. Vanzandt,* 24 US 184, 6 L Ed 488, *United States v. Kirkpatrick,* 22 US 720, 6 L Ed 199. Accordingly the prime sponsor's defense, which is factually based on laches, rather than estoppel, may not be maintained as a matter of law.

ORDER

For the foregoing reasons the appeal of the prime sponsor is denied. Payment to the United States of the $34,147.19 shall be made forthwith.

GLENN ROBERT LAWRENCE
Administrative Law Judge

Dated: July 29, 1982
Washington, D.C.
GRL/crg

APPENDIX B

Notification of Final Opinion in
In the Matter of
North Carolina Commission of Indian Affairs
No. 81-BCA/A-20
Dated: September 16, 1982

U.S. DEPARTMENT OF LABOR

September 16, 1982

Honorable Rufus L. Edmisten
Attorney General
State of North Carolina
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

Attention: Honorable Grayson G. Kelley
Assistant Attorney General

Dear Mr. Edmisten:

This is in reply to your letter of August 27, 1982, to the Secretary of Labor requesting that he vacate and review the decision of Administrative Law Judge ("ALJ") Glen Robert Lawrence of this Department in the matter of *North Carolina Commission of Indian Affairs,* Case No. 81-BCA/A-20 (a CETA-audit case), and issue a final decision thereon.

This is to advise you that the Secretary has decided not to stay, review, vacate, or modify the ALJ's decision in that case.

The regulations pertaining to CETA proceedings provide, at 20 CFR 676.91(f), that --

> "The decision of the Administrative Law Judge shall become the final decision of the secretary [of Labor] unless the Secretary modifies or vac-

ates the decision within 30 days after it is served."

Rights of parties to judicial review of such final actions are indicated in the regulations at 20 CFR 676.92(b), and in Section 107 of the basic CETA statute (29 U.S.C. 817).

Note is taken of the statement in your letter that -- although the ALJ's service sheet indicates that a copy of his decision was mailed to the North Carolina Commission on Indian Affairs -- no copy of it was mailed to the assistant attorney general handling the case for the Commission; but that the North Carolina Department of Justice did become aware of the ALJ's decision nonetheless on August 24, 1982.

Sincerely yours,

Walter Morse
Office of Administrative Appeals

APPENDIX C

Carolina (North Carolina Department of Natural Resources and Community Development) v. United States (U.S. Department of Labor) Grant Officer
No. 80-BCA/CETA-7
Dated: November 19, 1982

In the Matter of

THE STATE OF NORTH CAROLINA (NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT)
PRIME SPONSOR,
Grantee, (Appellant)

vs.

UNITED STATES (U.S. DEPARTMENT OF LABOR), GRANT OFFICER

and

Subgrantees:

Boise Cascade Corporation
Burke County Board of Commissioners
Cabarrus County Community Relations Committee
Carolina Associated Industries Management Development Corporation
Employment Security Commission
Franklin-Vance-Warren Opportunities
Jackson County
Lawrence Hose-Division of Consolidated Food
Masterpiece Reproductions, Inc.
City of Morganton
National Mount Airy Furniture
Division of Bassett Furniture
Industries Nash County
Neuwirth Volkswagen, Inc.
New Hanover County
Pender County

Piedmont Triad Council of Governments
Randolph County Board of Education
Rockingham County Fund, Inc.
Rural Advancement Fund
Waccamaw Industries
Wilson County
Wilson County Technical Institute

For the Grantee:

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Attorney General
By: Daniel F. McLawhorn
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For the United States: (Department of Labor) Grant Officer

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For Burke County Board of Commissioners:

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Valdese, North Carolina 28690

For Cabarrus County Community Relations Committee:

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Williams, Willford, Boger, Brandy, and Davis
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Pender County Finance Officer/Personnel Officer
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For Franklin-Vance-Warren Opportunities:

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Manpower Director
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For Rockingham County Fund, Inc.:

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For Carolina Associated Industries Management Development Corporation:

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Marvin Neuwirth

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For Wilson County Technical Institute:

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For the Rural Advancement Fund:

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Charlotte, North Carolina 28204

Boise Cascade Corporation:

Robert M. Meek, Esquire

Before: GLENN ROBERT LAWRENCE
Administrative Law Judge

DECISION AND ORDER

The State of North Carolina (Department of National Resources and Community Development), Grantee, Prime Sponsor received substantial grants from United States Department of Labor (DOL) under the Comprehensive Employment and Training Act of 1973, as amended 29 U.S.C. 801 et seq., (The Act) and the regulations issued pursuant thereto. As the result of audits which matured to a final determination of disallowances (Exhibit C-1, Item H, p. 6), a claim was made against the State for reimbursement of a sum now reduced to $101,404.56. On June 3, 1980 the State appealed the determination to our Office (Exhibit G-1, Item I). Hearings were held during the week of July 20, 1981 in Raleigh, North Carolina. At the request of the parties the record was held open until May 6, 1982. Briefs and reply briefs as well as proposed findings have been received from the principal parties (the grantee and the Grant officer) as well as some of the sub-grantees.

Issues and Summary Determination

a. The 1973 CETA statute by implication authorized DOL to obtain repayment from the State of moneys paid to ineligible applicants.

b. 20 C.F.R. Sec. 676.37(a) required the State to resolve subgrantee audits Questions.

c. The forgiveness requirements which would permit

waiver of the disallowences have not been met (20 C.F.R. Sec 676.88(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On June 1, 1974 DOL started to furnish the State with CETA funds which it turned over in part to subgrantees (Exhibit G-1, Item A, p. 1, p. 298).

2. On January 19, 1976, the State (The Prime Sponsor), agreed to have certified public accountants complete an audit of its subgrantees by November 30, 1976 (Ex. G-2, Tr. p. 89). The memorandum further provided the State had the responsibility to promptly correct subgrantee cost deficiencies (p. 88).

3. DOL, using the state audits, issued the following audits which included the disallowances in issue:

Grant Nos. 37-5-0139-10, 37-5-0223-18, 37-7-0055-10, 37-7-0206-18, 34-4-0092-32, and 37-6-0318-49 and interim audits of Grant Nos. 37-500202-21, 37-5-061-32, and 37-5-0318-60. The audit period was June 1, 1974 through September 30, 1977. (Ex. G-1, Item A, cover sheet; Tr. p. 101).

4. The State reviewed these audits at an exit conference December 13, 1978 (Ex. G-1, Item A, pp. 56, 222).

5. The final DOL audit was issued February 19, 1980 (Ex. G-1, Item A, Tr. p. 100).

6. After an exchange of letters between the State and DOL it was finally determined June 20, 1980 that $195,043 was disallowed and was due and owing the United States (Exhibit G-1, Item H. p. 6). Of that sum the Grantee agreed to $23,468.57 leaving a net amount in

issue of $171,574.43. As the result of settlements there is now outstanding a net amount of $101,464.58 representing disallowed payments to ineligible participants.

7. The State timely appealed to this Office on June 3, 1980 said disallowances (Exhibit G-1, Item I).

8. The State moved to join the subgrantees in order that the decision in this case reflect a "unified audit". This Office granted that motion by an Order on March 25, 1981. Since there appears to be no "privity" between the subgrantees and DOL, the subgrantee determinations are therefore only advisory. From time to time that Order has been modified to reflect removal of subgrantees that have settled.

9. In 1974 the State commenced auditing its subgrantees (Exhibit R-75). Requested by DOL to use independent auditors the State, after having discharged one audit firm, finally contracted in 1971 with Seidman and Seidman CPAs' to do the audits (Exhibit R-75).

10. 29 C.F.R. §98.31(b) (April 19, 1974; July 15, 1974; May 23, 1975 and July 26, 1976) described the Grantees monitoring responsibilities:

> (b) . . . Such procedures shall be used by the Prime Sponsor or eligible applicant in monitoring the day-to-day operations, to periodically review the performance of the program in relation to program goals and objectives, and to measure the effectiveness and impact of program results in terms of participants, program activities, and the community. The objective of such procedures shall be the improvement of overall program management and effectiveness.

11. 29 C.F.R. §98.32 required the Secretary of Labor to review the prime sponsor's program annually to determine whether it was being operated consistent with the Act and the CETA regulations.

12. In an assessment report issued for Fiscal Year 1975, the DOL determined that the State's management of its grant was marginal and that corrective action was necessary. (Ex. G-6, Tr., pp. 146-147).

13. In an assessment report issued in July, 1976, the DOL specified the weaknesses of the State's management of its grants and set forth recommended corrective action (Ex. G-7).

14. DOL on a number of other occasions including in September 1977 and February 22, 1978 notified the State it was deficient in monitoring and resolving subgrantee deficiencies cost items. (Ex. G, Tr. pp. 140-142; 137-138; 142; Exhibit G-1, Item A, p. 50 Tr. p. 99).

15. The State failed to act timely in response to said notices, (Tr. pp. 219-220; 130; 118; Exhibit G-1, Item A, p. 54, Tr. p. 103).

16. The Federal Auditor recommended that the State take immediate action to resolve subgrantee cost deficiencies (December 13, 1978; Exhibit G-1, Item A, p. 49). However there is no evidence that the State timely took such action.

17. In the grant closeout documents the Grantee:

a. assigned, transferred, set over and released to the U.S. Department of Labor all right, title and interest to all refunds, rebates, credits or other

amounts arising out of the performance of the grants;

b. agreed to take any necessary collections actions and pay over the monies collected to the U.S. Department of Labor; and

c. agreed to cooperate with any Department of Labor collection efforts.

(Ex. R-11, Item titled "Grantee's Assignment of Refunds, Rebates and Credits"; Tr. pp. 365-366).

18. The State failed to provide adequate documentation of participant eligibility. (Tr., p. 209)

19. The CETA regulations for Fiscal Years 1974, 1975, 1976 and 1977 require verification of participant eligibility. (Tr., p. 210) 29 C.F.R. §98.18; 96.14(b)(3); 99.15(a).

20. The Prime Sponsor bears the responsibility of assuring that verification of participant eligibility be accomplished. (Tr., pp. 210, 219 C.F.R. §98.18)

21. The Prime Sponsor may verify participant eligibility through its monitoring system. (Tr., p. 217).

22. Monitoring should consist of, *inter alia,* a review of the application records of the participants against the eligibility criteria of the CETA program in which they were enrolled. (Tr., p. 217).

23. The Prime Sponsor's monitoring system if administered properly would have revealed that participants in the CETA programs did not meet the eligibility criteria. (Tr., pp. 264-265).

24. The monitoring system of the State was not adequate to assure that participants in the CETA program met the eligibility requirements. (Tr., pp. 277-278).

25. The DOL conducted training sessions pertaining to grant management which were attended by Prime Sponsors in the State. (Tr., pp. 325-326).

26. The DOL informed the Prime Sponsors in its training sessions that they would be responsible for determining participant eligibility. (Tr., p. 327).

27. The DOL issued technical assistance guides and DOL Federal Representatives provided technical assistance to Prime Sponsors. (Tr., pp. 326-327).

28. The State conducted training for its subgrantess. (Tr., pp. 367-369).

29. The State conducted training for its subgrantees pertaining to enrollment from preparation and record maintenance. (Tr., p. 368).

30. The State's monitors were aware of their responsibilities to review eligibility verifications as well as program operations. (Tr., p. 369).

31. The State was aware of its responsibility to monitor fiscal systems. (Tr., p. 369).

32. The State failed to follow up its own discoveries of eligibility verification deficiencies. (Tr., pp. 370-371).

33. The Prime Sponsor had the responsibility to ensure that their subcontractors complied with the requirements of the statute, regulations and other applicable law. 29 C.F.R. §§95.42(c) and 97.19 (1974).

34. Subsequent regulations have continued to require the Prime Sponsor ensure that subgrantees comply with the regulations. 29 C.F.R. §98.27(d) (1975); 29 C.F.R. § 98.27(d) (1976).

35. The State admits that it had the responsibility to put its subgrantees on notice of ineligible participants. (Tr., pp. 372-374).

36. The State issued program operator handbooks for its subgrantees. (Tr., p. 382).

37. These programs operator handbooks contained DOL regulations, forms, and issuance pertaining to the operation of the grant. (Tr., pp. 382-383).

38. The State admits that its grant operations had to be in accordance with federal regulations. (Tr., p. 383).

39. The DOL provided grant funds to the State to cover monitoring costs. (Tr., pp. 386-388).

40. The State refused available grant funds to augment its monitoring staff. (Tr., pp. 387, 397).

41. The Grant Officer first applied the forgiveness section 20 C.F.R. §676.88(c), after the completion of the draft audit. (Tr., pp. 213, 241). The regulation was applied to the State's entire operation.

42. The Grant Officer also determined that the findings of the draft audit demonstrated that two of the factors to be considered in 20 C.F.R. §676.88(c) had not been met. (Tr., p. 214).

43. The Grant Officer applied 20 C.F.R. §676.88(c) subsequent to receiving requests by the subgrantees. He

determined that the costs could not be allowed.

44. The Grant Officer stated that lack of documentation of eligibility constitutes a failure to take immediate action to remove ineligible participants. (Tr., pp. 216-217, 223).

45. The Grant Officer determined that the State failed to take immediate remedial action in accordance with 20 C.F.R. §676.88(c)(4) until after the audits were completed. (Tr., p. 223).

46. Subsequent CETA regulations also required compliance with assurances and certifications. 20 C.F.R. § 95.31 (1975); 29 C.F.R. §95.31 (1976).

47. The Grant Officer concluded that anything which would lead to $13 million in questioned costs in the draft audit precluded the application of 20 C.F.R. §676.88(c). (Tr. p. 289).

48. 1974 Youth Programs

The following subgrantees operating under the 1973 CETA Act and using carry over funds from The Manpower Development and Training Act of 1962, The Equal Employment Act 1964 and the Emergency Employment Act of 1971 had, based on CETA Regulations, disallowed participants costs:

Randolph County Board of Education; Cynthia Laws, Mark Landon, Clara Dry, Jane Braswell and Edward Vocannon	$2,880
Carbarrus County Community Relations Commission-Byson Carter, Bobby Frinks, Jr., and David Easely	552.42

Franklin Vance Warren Opportunities — Andrew McGee 492.00

(Exhibits R-42, 43, 53, 56)

49. DOL had implied authority to issue and implement reasonable regulations on eligibility in furtherance of the 1974 Summer Youth Program (PL 93-203, Sec. 3; Tr., p. 105).

50. The threshold determination was not requested by the State nor was it made by DOL designating the State as an area of excessively high unemployment. (29 C.F.R. 99.50; 1975 Title VI Program).

CONCLUSIONS OF LAW

1. This case arises under the CETA statute of 1973, 20 U.S.C. §801 *et seq.*

2. The CETA statute of 1973, as amended (prior to 1978) provided grant funds to recipients to provide employment and training to eligible recipients.

3. CETA grant funds were subject to statutory and regulatory conditions 29 U.S.C. §816(b)(2).

4. The Secretary had broad rulemaking authority pursuant to 29 U.S.C. §982.

5. Grant agreements between the DOL and a prime sponsor contained assurances and certifications by which the Prime Sponsor agreed to abide. (Exh. R-9).

6. The Secretary had a statutory right to audit "any books, documents, papers, or records" of a recipient. See 29 U.S.C. §993.

7. The CETA statue provided a means by which disputes between the Secretary and grant recipients could be resolved. See 29 U.S.C. §§818, 819.

8. Pursuant to a determination after notice and opportunity for a hearing that a recipient of funds had violated its grant agreement or CETA, the statute mandated that the Secretary suspended payments to the Prime Sponsor "until he is satisfied that there will no longer be any failure to comply." See 29 U.S.C. §818(b)(2).

9. The statute required that the Secretary revoke a recipient's grant for certain violations. See 29 U.S.C. § 818(d).

10. The statutory language of CETA does not *expressly* authorize or prohibit the Secretary from recovering misspent funds.

11. The statutory authority to audit implies the power to recover those funds determined by an audit to have been misspent.

12. The ability to recover misspent funds, subsequent to an audit enables the Secretary to ensure accountability of federal funds.

13. The authorization in 29 U.S.C. §818(b)(2) which permits the Secretary to "suspend grant payments . . ." carries with it the implied authority to condition future funding upon a reimbursement of disallowed costs.

14. The language in 29 U.S.C. §982(b), authorizing the withholding of funds by the Secretary is not an exclusive remedy.

15. The languate "may *also* withhold funds" implies

that the Secretary may use other methods of recovering misspent funds.

16. Congress has placed the responsibility upon the Secretary to protect the integrity of federal funds and to ensure that grant funds are spent in compliance with federal law. H.R. Rep. No. 93-659, 93 Cong., 1st Sess. 8 (1973); 119 Cong. Rec. 11801 (1973).

17. CETA replaced previous employment and training statutes or portions thereof, including the Manpower Development and Training Act of 1962; Economic Opportunity Act of 1964 and the Emergency Employment Act of 1971.

18. Under the previous employment and training acts, the Secretary ordered repayment of misspent funds subsequent to audited costs being disallowed.

19. Silence by Congress on this matter coupled with its intent that the Secretary be accountable for these funds indicates the continued existence of this authority under CETA. *Blue Chip Stamps* v. *Manor Drug Store,* 421 U.S. 723 (1975), *NLRB* v. *Bell Aerospace,* 416 U.S. 267, 274-75 (1974).

20. The Secretary promulgated 29 C.F.R. §98.48(f) (1974) which states:

> (f) Content of orders. The final determination may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, under the program involved in accordance with the Act, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate

> the purposes of the Act and regulations issued thereunder, including provisions designed to assure that no Federal financial assistance will thereafter be extended under such program to the respondent determined by such decision to be in default in its performance of an assurance given by it pursuant to the Act or regulations issued thereunder, or to have otherwise failed to comply with the Act or regulations issued thereunder, unless and until it corrects its noncompliance, and satisfies the Secretary that it will fully comply with the Act and regulations issued thereunder.

21. This regulation provided the Secretary with the authority to impose conditions and terms necessary to effectuate the purposes of CETA and the regulations, including the power to recover disalllowed funds.

22. The Secretary's authority under 1973 CETA to recoup payment of misspent funds has been sustained by United States Court of Appeals. *Office of Maine CETA,* Case No. 80-CETA-53 (February 25, 1981), *aff'd* No. 81-1352 (1st Cir., January 25,1982) (maintenance of effort); *Orange County, New York,* Case No. 79-CETA-104 (February 29, 1980), *aff'd* 663 F.2d 889 (2d Cir. 1980), *cert. den.,* 450 U.S. 966 (1981) (nepotism); *City of New Orleans, Louisiana,* Case No. 80-CETA-123 (May 28, 1980), *aff'd* No. 80-3603 (5th Cir., May 29, 1981) (nepotism); *Fresno Employment and Training Commission,* Case No. 80-CETA-69 (September 10, 1980), *aff'd,* No. 80-7565 (9th Cir., October 29, 1982) (over payments of allowances); *Kennebec County,* Case No. 79-CETA-

191 (May 1, 1980), *aff'd,* No. 80-1453 (1st Cir., November 19, 1980) (unauthorized procurement of Xerox copier).

23. Administrative Law Judges have ordered repayment of misspent funds. *Note, City of Charlotte, North Carolina,* Case No. 78-CETA-120 (July 13, 1979) and the *State of Kansas,* Case No. 80-BCA/CETA-9 (June 22, 1981) where the sums of $865,835.36 and $98,264.95) respectively were determined unallowable and ordered repaid to the DOL.

24. An agency's interpretation of its statute is entitled to great deference. *E.I. dupont de Nemours* v. *Collins,* 432 U.S. 64, 54-55 (1977); *Griggs* v. *Duke Power Company,* 401 U.S. 424, 433-434 (1971); and *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965).

25. Congress' silence when amending CETA regarding the Secretary's established practice of ordering repayment of disallowed costs is a ratification of this practice. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381-382 (1969).

26. The United States has the right under common law to recover funds to which it is entitled. *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 151 (1965); *Atlantic Mutual Ins. Co.* v. *Cooney,* 303 F.2d 253, 259 (9th Cir. 1962).

27. The United States had the authority "to recover funds which its agents have wrongfully, erroneously or illegally paid." *United States* v. *Wurts,* 303 U.S. 414 (1938).

28. The Secretary has the right to order the repayment of grant funds spent in violation of the statute, its regulations and the grant agreement. *Mt. Sinai Hospital of Greater Miami* v. *Weinberger,* 517 F.2d 329 (5th Cir. 1975) *reh. en banc denied,* 522 F.2d 1979.

29. In cases analogous to the instant matter, the United States was allowed to recover federal funds provided and later spent in violation of federal law and regulations. See *United States* v. *Shanks,* 384 F.2d 721 (10th Cir. 1967) and *Utah State Board for Vocational Education* v. *United States,* 287 F.2d (10th Cir. 1961).

30. In a case involving similar issues, the United States Court of Appeals for the Fourth Circuit upheld the right of the Secretary of Education to order the repayment or misspent funds which had been granted and spent prior to 1978 statutory amendments specifically authorizing such authority. *State of West Virginia* v. *Secretary of Education,* No. 80-1704 (4th Cir. October 15, 1981).

31. Distinguishable from the instant case is *Pennhurst State School* v. *Halderman,* 451 U.S. 1, 101 S. Ct. 1531, 1539 67 L. Ed. 2d 694 (1981). The Court in *Pennhurst* precluded the retroactive application of statutory provisions. In the instant case, the Secretary of Labor has ordered repayment of misspent funds based upon his implied authority under 1973 CETA and not on the retroactive application of a later Act.

32. *Pennhurst* does not stand for the proposition that a condition applicable to all grantor-grantee relationships, i.e., the ability to recover misspent funds, is in-

applicable unless specifically stated in the statutory language.

33. In a similar case, *State of New Jersey, Department of Education* v. *Hufstedler,* 662 F.2d 208 (3rd Cir. 1981) *pet. for reh. en banc pending,* where the Court determined that the proper forum in which to exercise the right to recover misspent funds is in a court of competent jurisdiction and not an order pursuant to an administrative hearing. This Court did not deny the common-law right of recovery. This common law right, coupled with the CETA statutory provisions mandating that disputes on this nature be resolved through an administrative appeal process indicate that the Secretary had properly ordered the repayment of misspent funds. This case can be distinguished on the historically local nature of the program in New Jersey, unlike CETA and the federal manpower programs which preceded it.

34. The Comptroller General has the ultimate responsibility for the recovery of federal debts. See 31 U.S.C. §§71 and 93.

35. In a similar instance under the Emergency Employment Act (where recovery of funds was similarly limited) the Comptroller General found that the Secretary was obligated as required by 4 C.F.R. 1023 under the Federal Claims Collection Act, 3 U.S.C. §951 *et seq.* to seek the repayment of disallowed funds through other methods of recovery. See Unpublished Decision of Com. Gen., B0163922.53 (February 10, 1978).

36. The 1978 Amendments to CETA expressly authorized the Secretary to recover disallowed costs for non- CETA funds. 29 U.S.C. §816(d)(1) and (2).

37. The 1978 Amendments to CETA also expressly authorize the withholding of funds otherwise payable under this Act in order to recover any amounts expended in any fiscal year . . . 29 U.S.C. §816(g).

38. The legislative history of the 1978 Amendments to CETA indicate that Congress was specifically aware that the Secretary was ordering repayment of funds disallowed under the terms and provisions of the 1973 statute. 124 Cong. Rec. 821 (August 9, 1978); 124 Cong. Rec. 10473 (September 22, 1978).

39. The legislative history also indicates congressional disatisfication with DOL efforts in collecting disallowed costs. *Id.* 10473-74.

40. The legislative history of the 1978 Amendments to CETA demonstrate congressional affirmance of the authority of the Secretary under 1973 CETA to recover disallowed grant funds.

41. Congressional affirmance of prior legislative authority in subsequent legislation is entitled to great weight. *N.L.R.B.* v. *Bell Aerospace,* 416 U.S. 267, 275 (1974).

42. The DOL disallowed the costs at issue and ordered repayment of these funds from non-CETA funds in accordance with applicable statutory and regulatory provisions.

43. CETA does not require that the final determination cite every regulation which is violated.

44. Regulations are published in the Federal Register and made available to recipients.

45. Prime Sponsors have always been responsible for complying with the assurances and certifications contained in the grant agreement. 29 C.F.R. §95.31 (1974).

46. Subsequent CETA regulations also required compliance with assurances and certifications. 29 C.F.R. § 95.31 (1975); 29 C.F.R. §95.31 (1976).

47. Prime Sponsors have always had the responsibility to ensure that their subcontractors complied with the requirements of the statute, regulations and other applicable law. 29 C.F.R. §§95.41(c) and 97.19 (1974).

48. Subsequent regulations have continued to hold the Prime Sponsor responsible for the actions of its subgrantees 29 C.F.R. §98.27(d) (1975); 29 C.F.R. §98.27(d) (1976) (1977).

49. The State, as the grantee, has always had notice that it was responsible for the actions of its subgrantees.

50. A prime Sponsor may contract its operational responsibilities to a subgrantee, but not its requirement to ensure that the program is operated in accordance with the statute, the regulations and other applicable law and directives. The prime sponsor is responsible for the operation of the program.

51. The State was required to maintain adequate records pertaining to participants and to the operation of the program. 29 C.F.R. §98.18 (1974).

52. Similar record retention requirements existed during fiscal years 1975-1977. 29 C.F.R. §98.18 (1975 to 1977).

53. The CETA statute of 1973 did not prohibit the Sec-

retary from promulgating regulations establishing participants eligibility requirements in order to carry out the purposes of the statute.

54. The State established a monitoring unit which did not ensure that the subcontractors enrolled eligible participants and maintained adequate records to verify participant eligibility in accordance with the statute and its regulations.

55. The State failed to carry out its responsibility to resolve its subgrantee audits.

56. The DOL notified the State of its deficiencies in audit resolution during the auditing process.

57. A Prime Sponsor has the responsibility to resolve audits of its subrecipients in accordance with the Memorandum of Understanding and OMB Circular A-95 and 20 C.F.R. §98.6(e).

58. The resolution of costs between a prime sponsor and its subgrantees lies solely within the jurisdiction of the prime sponsor.

59. Costs pertaining to unresolved costs must be disallowed by the Grant Officer.

60. A Prime Sponsor is liable for costs diallowed subsequent to audits of its subgrantees.

61. The State failed to utilize the ample opportunity from the time of the subgrantee audits (1976) to the issuance of the final determination (1980) to resolve all subgrantee audit questions.

62. Millions of dollars in questioned costs due to lack of documentation support the determination of the Grant Officer that the State failed to adequately monitor its subgrantees to ensure compliance with the statute, the regulations and other applicable law.

63. The failure by the State to adequately monitor its subgrantees and its failure to timely resolve subgrantee audits violated its responsibilities as a grant recipient.

64. The State is liable for the disallowed costs attributable to its failure to meet its responsibilities under CETA.

65. The regulation at 20 C.F.R. §676.88(c) provides the Grant Officer discretionary authority to allow costs related to ineligible participants if certain conditions are met.

66. The regulation provides that the Grant Officer *may* allow these costs if the conditions are met.

67. The Grant Officer may allow these costs only in exceptional circumstances.

68. The stardard of review concerning this issue is solely whether the Grant Officer abused his discretion in applying the criteria set forth in 20 C.F.R. §676.88(c) to the circumstances of the State. 5 U.S.C. §706(2)(A).

69. The decision of the Grant Officer under this standard must be affirmed if a rational basis exists. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.* 419 U.S. 281, 285 (1974); *Contractors Transport Corp.* v. *United States,* 537 F.2d 1160, 1162 (4th Cir. 1976).

70. The decision to apply 20 C.F.R. §676.88(c) rests largely with the Grant Officer.

71. The reviewing tribunal cannot substitute its judgement in this matter for that of the Grant Officer. *Citizens to Preserve & Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971).

72. A rational basis exists to substantiate the decision by the Grant Officer.

73. The Grant Officer was correct in refusing to allow the costs associated with ineligible participants because all five conditions of 20 C.F.R. §676.88(c) had not been met.

74. The Grant Officer determined that only the first factor was met in this instance.

75. In all instances where the prime sponsor failed to resolve its subgrantee audits, the Grant Officer properly looked at the disallowed costs as a whole and found them to be substantial. *City of Durham, North Carolina,* 80-BCA/CETA-6 (September 9, 1980).

76. The Grant Officer properly disallowed all costs that the State itself had disallowed.

77. The Grant Officer's failure to apply 20 C.F.R. § 676.88(c) to costs disallowed in this matter is upheld.

78. The State, since its appeal, has vigorously and with success pursued its subgrantees for repayment of substantial sums paid to ineligible applicants. This is not consistent with the States claim that no repayment from the State to the United State is warranted.

79. The Grant Officer's order to repay the disallowed costs, after subtracting settled matters, is affirmed.

SUBSIDIARY FINDINGS OF FACT AND CONCLUSIONS OF LAW-SUB GRANTEES/OPERATORS

Preliminary

1. These findings and conclusions are made at the request of the State for a "unified audit".

2. These appears to be no privity between the subgrantees, its operators and the United States. These findings and conclusions are therefore only advisory.

3. In these cases, for the most part, the State's auditors already made these same or similar findings.

4. Eligibility determinations made by the Employment Security Commission (ESC) or an agreement to make such determinations do not equate to an assumption of liability by ESC. The requirement that eligibility enrollments be verified by operators and subgrantees exists regardless of what level of subgrantee of operator was involved. There are no agreements either express or implied that makes ESC an indemnitor for improper payments made by such subgrantees or operators to ineligible participants.

5. This Office has no jurisdiction to consider the argument that various CETA Regulations promulgated by DOL are void.

6. Inasmuch as it has been determined that the State is not entitled to forgiveness, it is not considered appropriate to extend such forgiveness to the subgrantees or operators. The State, at its discretion may forgive its subgrantees. However this will not reduce its liability to the United States.

7. New Hanover County paid the following sums to either ineligible applicants or applicants who's eligibility could not be determined on account of missing employment applications:

Lawrence W. Davis, application missing	$1,617
Randy Yates, application missing	294
Richard D. Williams, ineligible[1]	2,398
Total	$4,309

8. Employment Security Commission (ESC) through its Program Operators paid $37,467 of CETA grant moneys to ineligible participants. ESC and its Operators owes this amount to the State. (Contract 013 S 200; 0223 EJP S 8001; 1-01398-6-S-99; 1-32234-6-S-09; 0139 S 201; R 17, 18, 19, 20, 21, 22, 23, 24, 25).

9. These program operators are not relieved of liability[2] to ESC or the State.

Boise Cascase Corporation (Ex. R-26 and R-27)
Haw River (Ex. R-28)
Masterpiece Reproductions (Ex. R-29(a) and (b)
Neuwirth Volkswagen, Inc. (Tr. P. 652)

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[1]Requisite "under employment or unemployment" not shown (20 C.F.R. 99.36).

[2]ESC testifys erroneously that the term 10 contained in all of its contracts with its subgrantees relieved the Operators of eligibility responsibility (Tr. 669).

However the subgrant agreement between ESC and its operators included a provision that the subgrantees or the operators had the right to reject any applicant and that applicants will be hired under the CETA Regulations. This manifests a clear intent that the operators responsibility continues whether it received a ESC certification or not. (Term 9 of the sub grant agreements).

Waccamaw Industries
Burke County Board of Commissioners (Ex. R-33, R-33-1, 34, 35, 36)
City of Morgantown (R-37)
National Mt. Airy Furniture

10. Neuwirth Volkswagen Inc. a subgrantee of ESC knowingly hired ineligible applicant Allen Barrett (Tr. pp. 652-653), $5,974 was improperly expended in CETA money paying this applicant. This amount is owed by the subgrantee Neuwirth Volkswagen to ESC.[3]

11. Wilson County paid through its operator Wilson County Technical Institute, $7,759 to Eugene W. Schultz, Jr., an ineligible participant who had not been umemployed the requisite time. This amount is due and owing the State (R-39, Tr. 724-725; 20 C.F.R. 99.36 R. 40).

Wilson County Technical Institute owes Wilson County or the State the $7,759 it paid to Mr. Schultz. (R-40, Tr. 687, 790, R-40; 20 C.F.R. 99.36; Tr. p. 712).

12. Carbarrus County through its Community Relations Committee for the stated reasons, made the following payments to ineligible participants:

Byron V. Carter,	under age	$282.00
Bob Gene Fink, Jr.,	family income unstated	42.34
David Stewart Easley,	excess family income	210.64
Linda Furr,	over age	586.00
James Wetter,	excess family income	589.58
Total		$1,710.56

[3]The subgrantee was also liable for the same amount for the reasons set out in paragraph 4, 8 and 9 (supra).

The County owes the State $1,710.56.
(R-44, 46, Tr. 884; R-49, Tr. 875, R-42 and R-43, R-45„ Tr. p. 878; Tr. 878-880; Tr. p. 867).

13. Jackson County made the following payments to participants ineligible under 20 C.F.R. 99.36:

John Frizzel	$ 159
Loney Cabe	4,872
Thomas Farrel	252
Marvin Brooks	2,101
James Hensley	1,503
David Riggons	5,227
Bertha Thompson	393
Clyde Watson	849
Emmitt Blanton	5,129
William Benson	1,139
James Roper	1,028
Total	$22,651

The County owes said sum to the State (R-49, R-50).

14. Pender County made a payment of $336 to Jimmy Oliver Smith who was ineligible under 20 C.F.R. 99.36. (Exhibit R-52, Tr. 905-906, 916). The County owes that sum to the State.

15. Franklin-Vance-Warren Opportunity Inc. paid $492 to Andrew J. McGee who was ineligible under 29 C.F.R. 97.12 inasmuch as the participant's father's income, a school principal, exceeded the limits.

Though the application states that participant's mother had high medical expenses no amount is stated. There

was therefore no basis for excepting the participant from CETA Regulations.

The $492 is owed the State.
(Ex. R-53, 54; Tr. p. 936-938).

16. Piedmont Triad Council of Governments in violation of the Regulation requiring certain income limits made payments to the following ineligible participants:

Vergil Bulline	$ 215
Joseph Bripps	472
Larry Staley	337
Clarence Jones	726
Bobby Rice	310
Total	$2,060

The total amount is owed the State.
(20 C.F.R. 595.32; Exhibit R-57).

17. Piedmont Triad Council of Governments, by its operator Randolph County Board of Education, made the following payments to ineligible participants who's family income exceeded the proper limits:

Cynthia Laws	$485
Mark Landon	417
Clara Dry	650
Jane Braswell	730
Edward Voncannon	598
Total	$2,880

The total amount is owed by the Board to the council. Said amount is owed by the council to the State.
(20 C.F.R. 95.32; Exhibit R-57; Exhibit Ran-1; Tr. pp. 963-64).

18. Rockingham County Fund Inc. through its operator Rockingham Community College violated the nepotism regulation at 20 C.F.R. §§98.27 and 96.48 and made payments of $2,916 to ineligible participant Jane Norwood. Ms. Norwood was the wife of C. Ronald Norwood, executive director of the Rockingham Fund, Inc. The Regulations was intended to avoid the obvious conflict involved in hiring a spouse under such circumstances. That the hiring was by another unit is a technical defense violating the spirit of the Regulations. Said sum is owed the State. The College owes that amount to the Fund.

(Exhibits R-59 and 61; Tr. p. 976, 978, 987, 979).

19. Carolina Associated Industries paid ineligible persons $18,884 who were supposed to be, but were not underemployed, unemployed or economically disadvantaged. Said sum is owed to State. Arguments that eligibility is to be determined by the grant proposal rather than the CETA law and regulations are untenable. (R-65, 29 C.F.R. 95.32(a), 94.4 (FFF), 94.4 (999), 96.25).

Based on the foregoing Findings and Conclusions, the State is Ordered to repay forthwith to the United States the total sum of $101,464.58.

GLENN ROBERT LAWRENCE
Administrative Law Judge

Date: Nov. 19, 1982
Washington, D.C

GRL/crg

APPENDIX D

Opinion of the United States Court of Appeals
for the Fourth Circuit in
North Carolina Commission of Indian Affairs and
North Carolina Department of Natural Resources and
Community Development
v.
United States Department of Labor
No. 82-1936(L); 83-1079; 83-1161
Dated: January 12, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1936(L)

North Carolina Commission of
Indian Affairs,

Petitioner,

vs.

United States Department of Labor,

Respondent.

National Association fo Counties;
National League of Cities;
United States Conference of Mayors;
American Public Welfare Association;
National Council of Local Public Welfare
Administrators; City of Stockton, California;
County of Los Angeles, California;
County of Onslow, North Carolina; City of
Portland, Oregon; City of Boston,
Massachusetts; Broward Employment and
Training Administration; State of Maine;
Franklin County, New York, Employment and
Training Administration; Alameda County
Training and Employment Board; City of San
Jose, California; Memphis and Shelby County,
Tennessee, Consortium; City of Bridgeport,
Connecticut; City of Camden, New Jersey; Toledo
Area Consortium; City of Los Angeles,
California; City of Detroit, Michigan; and
State of Vermont.

Amici Curiae.

No. 83-1079

North Carolina Department of Natural Resources and Community Development,

Petitioner,

vs.

United States Department of Labor,

Respondent.

No. 83-1161

Wilson County and Wilson County Technical Institute,

Petitioners,

vs.

National League of Cities; United States Conference of Mayors; Department of Natural Resources and Community Development,

Respondents.

On Petition for Review of an Order of the U.S. Department of Labor.

Argued: October 3, 1983 Decided: January 12, 1984

Before ERVIN and CHAPMAN, Circuit Judges and BUTZNER, Senior Circuit Judge.

Elizabeth Anania (Rufus L. Edmisten, Attorney General, Daniel McLawhorn on brief); George A. Weaver; L.H. Gibbons (Carr, Gibbons, Cozart & Jones on brief) for Petitioners; Steven J. Mandel, Jane C. Snell (Francis X. Lilly, Deputy Solicitor, William H. DuRoss, III, Associate Solicitor for Employment and Training; Harry L. Sheinfeld, Counsel for Litigation, E. Kathleen Shahan on brief) for Respondent; (Robert N. Sayler, John E. Heintz, Karen H. Rothenberg, Joan E. Donoghue, Covington & Burling on brief) for Amici Curiae.

CHAPMAN, Circuit Judge:

The principal issue in this appeal by the North Carolina Commission of Indian Affairs (Commission) and the North Carolina Department of Natural Resources and Community Development (Department) (collectively, North Carolina or the State) is whether the Secretary of Labor may order repayment of $135,611.77 in misspent funds under the Comprehensive Employment and Training Act of 1973, Pub. L. 93-203, 87 Stat. 839, 29 U.S.C. § 801 *et seq.* (1973) (1973 CETA Act). North Carolina claims that, prior to amendments enacted in 1978, the Secretary of Labor's sole remedy when funds were improperly expended was to withhold future grant moneys. In reliance on the Supreme Court's decision in *Bell v. New Jersey and Pennsylvania*, ____ U.S. ____, 103 S. Ct. 2187, 76 L.ED. 2d 313 (1983), which held that the Secretary of Education was entitled to order recoupment of misspent grant funds under the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. 89-10, 79 Stat. 27, as amended, 20 U.S.C. § 2701 *et seq.* (1976 ed. Supp. V) and in

accord with the decision of the Court of Appeals for the Third Circuit in *Atlantic County New Jersey v. United States Department of Labor*, 715 F.2d 834 (3rd Cir. 1983), we hold that the authority to require repayment of improper expenditures existed under the 1973 CETA Act. Finding also that there was substantial evidence to support the Secretary of Labor's conclusion that the funds were improperly expended or inadequately monitored and that North Carolina was responsible for insuring that the grant was properly administered, we affirm the Secretary's repayment order.[1]

I

The two North Carolina governmental agencies, as "prime sponsors" under the 1973 CETA Act, received grant funds from the Department of Labor and contracted with subgrantees for expenditure of the funds. Grantees and subgrantees receive CETA funds prior to expenditure instead of being reimbursed by the Department of Labor after moneys are expended. Since the Grants were awarded prior to 1978, the provisions of the 1973 Act control. Following an audit and a grants officer's determination that certain funds had been misused,[2] the Administrative Law

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[1]The Adminsitrative Law Judge (ALJ), in his orders which became final decisions of the Secretary of Labor pursuant to 20 C.F.R. § 679.91(f) (1982) included an "advisory opinion" that subgrantees Wilson County and Wilson County Technical Institute were liable to North Carolina for misspent monies. We decline to rule on this question because of lack of jurisdiction. There is no controversy because the ALJ did not have the authority, nor did he purport, to require the two subgrantees to do anything.

[2]The CETA audit report of the Commission covered the period from November 1, 1974 through December 31, 1975. The Department was audited for the period from June 1, 1974 through September 30, 1977.

Judge (ALJ) issued orders instructing the Commission to repay $34,147.19 and the Department, $101,464.58.[3] These orders became final decisions of the Secretary.

II

North Carolina questions whether the rule of *S.E.C. v. Chenery*, 332 U.S. 194, 196 (1947) that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency" precludes this court from affirming the ALJ's order based on an interpretation of the 1973 CETA Act that differs from the ALJ's interpretation. (The ALJ found that the "1973 statute by implication authorized the Department of Labor to obtain repayment from the State of moneys, paid to ineligible applications." Based on the reasoning of *Bell*, we find that repayment authority is found in the language of the 1973 statute.) We do not, however, perceive there to be a *Chenery* problem in the instant case because the question of interpretation of a federal statute is not "a determination or judgment which an administrative agency alone is authorized to make." *Chenery, supra.* A

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[3]The Commission was found to have violated the 1973 Act by using CETA funds to pay the total amount of salaries of employees who spent time working with federal grants other than CETA. Monies from the various federal programs should have been allocated on a pro rata basis for the salaries. Certain participants were found to have been ineligible because of kinship ties with other employees. Duplicate time sheets were submitted for one participants.

The ALJ found that the Department's monitoring of its subgrantees was inadequate to assure that only eligible participants were enrolled in the program. The ALJ also found that the Department failed to resolve audits of its subgrantees in a timely manner and that the Department was liable for the costs disallowed subsequent to these audits. North Carolina in its brief and at oral argument focused primarily on the Department's liability.

similar question of statutory interpretation was at issue in *Milk Transport v. Interstate Commerce Commission*, 190 F. Supp. 350 (D. Minn. 1960), *aff'd per curiam* 368 U.S. 5 (1961). The court concluded that *Chenery* was not applicable:

> We are not concerned here with a judgment which only the Interstate Commerce Commission can make. The expertness of the Commission does not make it better qualified than this court to interpret the phrase ... involved in this action. The interpretation here is wholly different from what it is in the case where Congress specifically entrusts an administrative agency, because of its special competence, with the task of defining or interpreting general words or setting up standards or rules of conduct. We are interpreting the scope of a federal statute and this task is not peculiar to an administrative agency. 190 F. Supp. at 355. (footnote omitted).

III

The Secretary of Labor raises three grounds in support of his authority to require repayment by North Carolina. First the Secretary argues that the 1973 Act includes a right of recovery. The Secretary also contends that the 1978 Act, which Congress amended to provide expressly for recovery of misused funds, may be applied retroactively to reach funds administered under the earlier act. Labor's third argument is that there is a common law right of recovery. Following the lead of *Bell*, we find that a right of recovery exists under the 1973 Act, and therefore we need not reach the issues of whether recovery is also authorized by retroactive application of the 1978 amendments or by the common law.

In *Bell* the Court found that the argument that ESEA

contained a recoupment right was supported by the language, the legislative history and the administrative interpretation and the overall rational eof the 1973 CETA act are sufficiently similar to that of ESEA to mandate a finding that the Department of Labor may order repayment of misapplied moneys.

Section 602(b) of the 1973 CETA Act provided in part:

> The Secretary may make . . . necessary adjustments in payments on account of overpayments or underpayments. The Secretary may also withhold funds otherwise payable under this chapter, but only in order to recover any amounts expended in the current or immediately prior fiscal year in violation of any provision of this chapter.

North Carolina contends that the withholding provision gives the only available remedy in the event of noncompliance by a grantee. In *Bell*, however, the Court found that in a similar provision of ESEA,[4] the "plain language of the statute" recognized the right of the federal government to overpaid funds. 103 S. Ct. at 2193. The *Bell* court also found that to adopt the State's view of set-off as the only remedy would allow the State to escape liability for misuse of the moneys while penalizing those who were

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[4]Section 207(a)(1) of ESEA provided:

> The Commssioner shall, subject to the provisions of § 208, from time to time pay to each State, in advance or otherwise, the amount which the local educational agencies of that State are eligible to receive under this part. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it.

intended to benefit from the programs by reducing the amount of funds that the beneficiaries would actually receive. 103 S. Ct. at 2192 n.5 and 2193 n.8.

North Carolina seeks to distinguish § 602(b) from the provision of ESEA relied on in *Bell* to authorize repayment. The State's argument is that only the withholding sanction, and the adjustments in payments language, applies to recoupment of amounts expended in violation of the act. North Carolina contends that any other construction would render the last sentence of § 602(b) redundant or largely superfluous. The argument is refuted, however, by the fact that ESEA also provided for withholding funds from a State that failed to comply with the requirements of the program. Section 146, 20 U.S.C. § 241j. Moreover, in providing that the Secretary "may *also* withhold funds" the language of § 602(b) indicates that remedies other than withholding are available to the Department of Labor.

North Carolina argues that, because the 1978 amendments expressly provided for right of repayment,[5] there was no similar right under the 1973 Act, otherwise the later amendments would be redundant. The *Bell* Court was faced with the issue of later amendments to ESEA wthat clearly provided for the federal government's right to demand repayment when states misused grant moneys. The Court concluded that the discussion of the 1978 amendments to ESEA, which were of persuasive value,

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[5]Section 816(d)(1) of the 1978 Act provided:

> [T]he Secretary shall have authority to terminate or suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds from sources other than funds under this chapter and the withholding of future funding.

revealed that Congress thought that recipients were already liable for misused funds. 103 S.Ct. at 2194.

The comments made by members of Congress during the debates on the 1978 CETA amendments indicate that they assumed the existence of a right of recovery and approved of the Department of Labor's pre-1978 practice of actually recoupig funds.[6] The Congressional intent in amending the CETA Act in this manner apepars to have been to clarify a pre-existing right and not to provide Labor with new authority.

The agency's practice of ordering that funds be reimbursed prior to the 1978 amendments also supports Labor's argument that a right of recovery existed under the 1973 Act. As observed by the court in *Atlantic County*, recoupment under CETA's predecessors amounted to "more than the 'long held' view of an agency which the *Bell* court found persuasive." 715 F.2d at 836 (citation omitted). The CETA Act of 1973 replaced a number of earlier federal

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[6]In *Atlantic County* the court reviewed comments from the Congressional debates:

> Rep. Hawkins, the amendment's floor manager, reported recovery of $23 million in misused CETA funds. 124 Cong. Rec. 25168 (1978). Rep. Cornell pointed to Chicago's repayment of $1 million in misspent CETA funds. 124 Cong. Rec. 25221 91978). Representatives Maguire and Collins criticized the Department of Labor for having recovered only about 15% of the misused funds. 124 Cong. REc. 31021-31026 (1978). Senator Bellmon expressed the hope that the 1978 amendment would encourage more aggressive recoupment by clarifying the Department's authority to recover funds. 124 Cong. Rec. 27789 (1978). 715 F.2d at 836.

employment and training programs.[7] Although the earlier laws provided no express right of recoupment, the Secretary of Labor routinely audited grantees, disallowed costs and recovered misspent funds. *See Midlands Community Act Agency*, 73-1 BCA ¶ 9790 (November 30, 1972) (EOA and MDTA); *Metropolitan Denver Construction Opportunity Policy Committee*, 74-2 BCA 10, 749 (August 14, 1974) (MDTA), *aff'd*, 578 F.2d 1390 (Ct. Cl., 1978).

North Carolina's final objection is that the CETA Act of 1973 does not meet the mandate of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) that Congress act unambiguously when it intends to impose a condition on the grant of federal money. We think that the Supreme Court's two grounds for distinguishing *Pennhurst* with respect to ESEA are equally applicable to CETA. The Court found that the plain language of ESEA was sufficiently clear to meet *Pennhurst's* requirement of legislative clarity and that *Pennhurst* involved imposition of an unexpected condition of compliance while in *Bell* the Court was concerned with remedies available against a noncomplying State. 103 S.Ct. at 2197 n.17.

IV

Having decided that the Department of Labor has the authority to recoup misspent funds, we must address the issue of whether there is substantial evidence to support the

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[7]The Manpower Development and Training Act of 1962 ("MDTA"), Pub. L. No. 87-415, 76 Stat. 23, U.S.C. § 2571 *et seq.* (1966) (repealed 1973), the Economic Opportunity Act of 1964"), 78 Stat. 508, 42 U.S.C. § 4871 *et seq.* (1976), and the Emergency Employment Act of 1971 ("EEA"), Pub. L. No. 92-54, 85 Stat. 146, 42 U.S.C. § 2701 *et seq.* (1976) (repealed 1981).

Seceretary's conclusion that the moneys were improperly expended. 29 U.S.C. § 817(b) 1978). North Carolina does not dispute that subgrantees were inadquately monitored for participant eligibility or that the question costs were not resolved in a timely manner. The State argues, however, that it was not responsible for these isntances of inadequate Administration. We disagree. In the overall scheme of the CETA Act, although a grantee may enter into contracts and subgrants, the grantee retains the responsibility for development, approval and operation of all grants and subgrants. *Milwaukee County v. Peters*, 682 F.2d 609, 612-613 (7th Cir. 1982). The regulations provide that the prime sponsor shall require that its contractors and subgrantees adhere to the requirements of the Act, regulations and other applicable law. 29 C.F.R. § 98.27. North Carolina's responsibility under the legislative scheme is clear and the Secretary's decision is supported by substantial evidenced.

AFFIRMED.

APPENDIX E

Denial of Petition for Rehearing and Suggestion for Rehearing En Banc by the United States Court of Appeals for the Fourth Circuit in
North Carolina Commission of Indian Affairs and
North Carolina Department of Natural Resources and Community Development
v.
United States Department of Labor
No. 82-1936(L); 83-1079; 83-1161
Dated: March 6, 1984

UNTIED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82-1936

FILED
MAR 6, 1984
U.S. Court of Appeals
Fourth Circuit

North Carolina Commission
of Indian Affairs,

Petitioner,

versus

United States Department of Labor,

Respondent.

National Association of Counties, et al,

Amici Curiae.

ORDER

Upon consideration of the petitioner's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED AND ORDERED that the petition for rehearing is denied.

Entered at the direction fo Judge Chapman for a panel consisting of Judge Ervin, Judge Chapman, and Judge Butzner.

For the Court,

/s/ William K. Slate, II

_____

CLERK

APPENDIX F

Judgment of the United States Court of Appeals
for the Fourth Circuit in
North Carolina Commission of Indian Affairs and
North Carolina Department of Natural Resources
and Community Development
v.
United States Department of Labor
No. 82-1936(L); 83-1079; 83-1161
Dated: January 12, 1984

United States Court of Appeals

FOR THE FOURTH CIRCUIT
January 12, 1984

Elizabeth Anania, AAG
Harry Sheinfeld, Esq.
Kathleen Shahan, Esq.
Jane E. Snell, Esq.
Steven Mandel, Esq.

John E. Heintz, Esq.
George A. Weaver, Esq.

L.H. Gibbons, Esq.

TO:

NOTICE OF JUDGMENT

Judgment was entered in Case No. 82-1936, 83-1079, 83-1161 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed with 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the

case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of hte situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A

timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

WILLIAM K. SLATE, II
CLERK

CERTIFICATE OF SERVICE

I hereby certify that I have, this 4th day of June, 1984, caused three copies of the Petition for Writ of Certiorari to the United States Court of Appeals in the Case of North Carolina Commission of Indian Affairs and North Carolina Department of Natural Resources and Community Development v. United States Department of Labor to be placed in the United States mail addresses to Harry Sheinfeld, counsel of record for the United States Department of Labor in the proceedings below, at his office, Office of the Solicitor, United States Department of Labor, N-2101, 200 Constitution Avenue, NW, Washington, DC 20004.

_____

Elizabeth Anania

No. 83-1981

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
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QUESTION PRESENTED

Whether the Secretary of Labor has authority under the Comprehensive Employment and Training Act of 1973 to require repayment of grant funds misspent prior to 1978.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1981

NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A50-A60) is reported at 725 F.2d 238. The opinions of the administrative law judge (Pet. App. A2-A13, A17-A48) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1984. A petition for rehearing was denied on March 6, 1984 (Pet. App. A61-A63). The petition for a writ of certiorari was filed on June 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are state governmental agencies that served as "prime sponsors" under the Comprehensive Employment and Training Act of 1973 (CETA), Pub. L.

No. 93-203, 87 Stat. 839, 29 U.S.C. (1976 ed.) 801 *et seq.*[1] As such, they received grant funds from the Department of Labor and contracted with subgrantees for expenditure of the funds (Pet. App. A53). The grants at issue in this case were awarded under the original Comprehensive Employment and Training Act of 1973, before enactment of the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909, 29 U.S.C. (Supp. V 1981) 801 *et seq.*[2] CETA has now been repealed and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.*[3]

CETA established decentralized and noncategorical employment and training programs for unemployed, underemployed, and economically disadvantaged persons. These programs were designed to be responsive to local needs, subject to continuing federal oversight. § 2, 87 Stat. 839, 29 U.S.C. (1976 ed.) 801; H.R. Rep. 93-659, 93d Cong., 1st Sess. 1 (1973). To receive financial assistance, a prime sponsor was required to submit a "comprehensive manpower plan" meeting specific statutory and regulatory criteria. § 105, 87 Stat. 843-844, 29 U.S.C. (1976 ed.) 815. Additional conditions for funding were contained in the Act, regulations, and assurances set forth in the grant itself. Grant payments could be made in advance of expenditures or by way of reimbursement or otherwise, as the Secretary

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[1]A prime sponsor was the entity to which financial assistance was made available under CETA. Most CETA programs were administered at the local level by a prime sponsor, which was usually a unit of state or local government. See Section 102, 87 Stat. 841, 29 U.S.C. (1976 ed.) 812.

[2]The 1978 CETA Amendments expressly authorized the Secretary to order recipients to repay misspent funds. § 2, 92 Stat. 1927, 29 U.S.C. (Supp. V 1981) 816(d)(1) and (2).

[3]The Job Training Partnership Act does not affect pending CETA administrative or judicial proceedings. 29 U.S.C. 1591.

deemed necessary to carry out the Act's provisions. § 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b). The Secretary by regulation chose to use an advance-funding method of distributing CETA funds because most recipients were unable to operate on a cost-reimbursement basis. 29 C.F.R. 98.2 (1976).

Under the 1973 Act, the Secretary had broad authority to audit grant recipients to assure that funds provided under the Act were used in accordance with its provisions. § 613, 87 Stat. 882, 29 U.S.C. (1976 ed.) 992. The implementing regulations described applicable audit procedures in detail, including the process by which the agency determined whether specific expenditures should be disallowed. 29 C.F.R. 98.6 (1976). If, as a result of an audit, the Secretary determined that funds had been misspent, he could, under Section 602(b), make necessary adjustments in payments. 87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b). The Secretary was also empowered, in specified circumstances, to withhold future funds in cases of misspending. *Ibid.* In the event that the Secretary chose to withhold funds, however, the grantee was not permitted to reduce program operations. 29 C.F.R. 98.15 (1976).

2. Following CETA audits, the Department of Labor determined that petitioners had misspent CETA funds in connection with the hiring of ineligible CETA participants and the payment of CETA staff salaries (Pet. App. A4-A9, A24-A31).[4] As a result, petitioners were asked to repay the disallowed costs to the Department of Labor. Petitioners

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[4]A grant officer makes the initial audit determinations and provides an opportunity for informal resolution. The grant officer thereafter will issue a final determination, which the grantee may challenge in an evidentiary hearing before an administrative law judge. If after 30 days the Secretary leaves the ALJ's decision undisturbed, it becomes the final decision of the Secretary and is subject to judicial review in the court of appeals for the circuit where the grantee resides. 20 C.F.R. 676.86-676.92.

contested these determinations. Following hearings in separate proceedings, an administrative law judge (ALJ) affirmed the disallowances and ordered petitioners to make repayment.

The ALJ held that petitioner North Carolina Commission of Indian Affairs had violated CETA by using CETA funds to pay the total amount of salaries of employees who spent time working with federal grants other than CETA, and by hiring CETA participants in violation of the nepotism prohibitions in the regulations (Pet. App. A6-A9, A54 n.3). He rejected the argument that the government should be precluded, on grounds of estoppel or laches, from seeking repayment of the disallowed costs (*id.* at A10-A12). Accordingly, the ALJ ordered petitioner North Carolina Commission of Indian Affairs to repay $34,147.19 (*id.* at A13). The ALJ's decision became the final decision of the Secretary when the Secretary did not modify or vacate it within 30 days. 20 C.F.R. 676.91(f). The Secretary's authority to order repayment was not challenged in this proceeding.

The ALJ also held that petitioner North Carolina Department of Natural Resources and Community Development had violated CETA by failing adequately to monitor its subgrantees to assure the eligibility of participants enrolled in their CETA programs. He further ruled that the state agency had failed to resolve audits of its subgrantees in a timely manner and was liable for the costs disallowed subsequent to those audits. Pet. App. A25-A31, A39-A42, A54 n.3. Finally, the ALJ decided that the 1973 Act implied the authority for the Secretary to recover misspent grant funds by ordering repayment (*id.* at A31-A38).[5] Based on these rulings, the ALJ directed petitioner North Carolina

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[5]The ALJ also found a common-law right to require repayment in order to recover misspent grant funds (Pet. App. A35).

Department of Natural Resources and Community Development to repay $101,464.58 (*id.* at A48). This decision became the final decision of the Secretary pursuant to 20 C.F.R. 676.91(f).

3. The court of appeals affirmed (Pet. App. A50-A60). Relying on this Court's decision in *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), which upheld the Secretary of Education's authority to order repayment of misspent grant funds under the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 2701 *et seq.*, the court of appeals held that the 1973 Comprehensive Employment and Training Act likewise authorized the Secretary of Labor to recoup misspent grants by means of repayment. In particular, the court ruled that "the language, the evidence of legislative intent, the administrative interpretation and the overall rationale of the 1973 CETA Act are sufficiently similar to that of ESEA to mandate a finding that the Department of Labor may order repayment of misapplied moneys" (Pet. App. A56; 725 F.2d at 240-241).[6]

The court of appeals observed that the language in Section 602(b) of CETA (87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b)) permitting the Secretary to make "necessary adjustments in payments on account of overpayments or underpayments" is similar to the language in ESEA from which this Court found repayment authority in *Bell*. The court also rejected petitioners' argument that the Secretary of Labor's authority to withhold funds from future grants is the exclusive method to recover misspent funds, reasoning that ESEA also provided for withholding funds and that in any event Section 602(b) of CETA states that the Secretary "may *also* withhold funds" (87 Stat. 878, 29 U.S.C. (1976

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[6]This portion of the court of appeals' opinion is misprinted in the Appendix to the Petition.

ed.) 962(b) (emphasis added)). Pet. App. A56-A57. In addition, the court of appeals, following the analysis in *Bell*, concluded that the legislative history of the 1978 CETA Amendments, which expressly provided repayment authority, indicated that Congress "assumed the existence of a right of recovery and approved of the Department of Labor's pre-1978 practice of actually recoupi[n]g funds" (Pet. App. A57-A58 (footnote omitted)). And, again as in *Bell*, the court found that "[t]he agency's practice of ordering that funds be reimbursed prior to the 1978 amendments also supports Labor's argument that a right of recovery existed under the 1973 Act" (*id.* at A58). Finally, relying on this Court's discussion in *Bell* of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), the court of appeals distinguished *Pennhurst* on the grounds that CETA repayment authority satisfied the requirement of legislative clarity and involved remedies for past noncompliance rather than unexpected conditions of compliance (Pet. App. A59).[7]

ARGUMENT

The court of appeals correctly applied the controlling principles set forth in *Bell* v. *New Jersey*, *supra*, to the substantially similar statutory scheme involved in this case, and its conclusions are in accord with the decisions of all other courts of appeals that have considered the issue of repayment authority under the 1973 CETA Act. Accordingly, further review is not warranted.

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[7]The court of appeals also concluded that there was substantial evidence to support the Secretary's finding that the funds had been improperly spent (Pet. App. A59-A60). Petitioners have conceded, for purposes of their Petition, that the funds were misspent (Pet. 6).

Because it held that the 1973 Act authorized repayment, the court of appeals, "[f]ollowing the lead of *Bell*" (Pet. App. A55), found it unnecessary to reach the Secretary's additional arguments that repayment was authorized by retroactive application of the 1978 CETA Amendments or by the common law.

1. In *Bell*, this Court held that the Department of Education has authority to recover misused funds under the pre-1978 version of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.* The Court held (*Bell*, slip op. 8-10) that the "plain language" of ESEA, which required payments of federal grants to take into account or make adjustments for any overpayments or underpayments in previous grants, gave the government the right to recover misspent funds. The Court also noted (slip op. 9-12, 15-16) that its interpretation of ESEA was supported by the contemporaneous and subsequent legislative history of the statute. In originally enacting ESEA, Congress made clear its intention that states return misused funds, and subsequent legislative actions confirmed this policy; indeed, in amending ESEA in 1978 expressly to permit recovery of misused funds, Congress indicated its understanding that repayment authority already existed, and the 1978 Amendment had been designed to clarify the government's legal authority and to encourage greater use of the recoupment remedy. Finally, the Court emphasized that the Department of Education had long recognized that it was authorized to seek repayment of misused funds and that it had in fact exercised such authority.

As the court of appeals correctly held (Pet. App. A56-A57; 725 F.2d at 240-241), the language, legislative history, and administrative interpretation of the 1973 CETA Act closely parallel those of ESEA. Every court of appeals that has considered the question has concluded, in accord with the decision below, that under the *Bell* analysis the 1973 CETA Act authorizes the Secretary of Labor to require repayment of misspent grant funds. See *California Tribal Chairman's Ass'n* v. *United States Department of Labor*, 730 F.2d 1289 (9th Cir. 1984); *Texarkana Metropolitan Area Manpower Consortium* v. *Donovan*, 721 F.2d 1162

(8th Cir. 1983) (per curiam); *Lehigh Valley Manpower Program* v. *Donovan*, 718 F.2d 99 (3d Cir. 1983); *Atlantic County* v. *United States Department of Labor*, 715 F.2d 834 (3d Cir. 1983) (per curiam).

a. In Section 602(b) of CETA, Congress specifically delegated to the Secretary of Labor broad discretion "to make such grants, contracts, or agreements, establish such procedures * * *, and make such payments, in installments and in advance or by way of reimbursement, or otherwise allocate or expend funds made available under this Act, as he may deem necessary to carry out the provisions of this Act * * *, *including necessary adjustments in payments on account of overpayments or underpayments.*" 87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b) (emphasis added). Congress also granted the Secretary general authority to audit grant recipients "[i]n order to assure that funds provided under this Act are used in accordance with its provisions." § 613, 87 Stat. 882, 29 U.S.C. (1976 ed.) 992. These provisions in CETA are virtually identical to those relied upon by this Court to find a right of repayment under ESEA. *Bell*, slip op. 8-10 & n.10. Under *Bell*, therefore, this language authorizes the Secretary of Labor to require refunds of misspent monies under CETA.

Repayment authority, moreover, is a reasonable element of the CETA statutory scheme. The authority to audit a grant recipient suggests the inherent right to recover misspent funds identified by the grant officer. As noted above, the stated purpose of a CETA audit is to assure that funds have been used in accordance with the Act's provisions, and recovery of misspent funds discovered through an audit represents an evident means of enforcement that is integrally related to that objective.

That the CETA statute authorizes a recovery remedy is further made clear by the specific grant of authority in Section 602(b) for the Secretary to disburse monies by way

of reimbursement for prior expenditures as an alternative to making payments in advance. 87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b). Ordinarily, the Secretary made funds available in advance to grantees because many recipients would not have been able to operate on a cost-reimbursement basis. If, however, the Secretary had operated on a reimbursement basis and funds had been misspent, the Secretary could simply have declined to make payments for the disallowed expenses pursuant to the express provisions of Sections 108(b)(2) and 602(b) of CETA. 87 Stat. 847, 878, 29 U.S.C. (1976 ed.) 818(b)(2), 962(b); see also 29 C.F.R. 98.15 (1976). There is no reason to conclude that Congress intended to relieve a grantee of the responsibility for misspent funds simply because the Secretary chose, in either a single case or a class of cases, to use an advance-funding method.

To be sure, the Secretary of Labor, like the Secretary of Education under Section 210 of ESEA (20 U.S.C. (Supp. V 1981) 2890 (repealed by Pub. L. No. 97-35, § 587(a)(1), 95 Stat. 480)), was authorized to "withhold funds otherwise payable under this Act." § 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b). But, contrary to petitioners' assertions (Pet. 8-13), there is no suggestion in the statute that withholding was to be the exclusive means to recover misspent funds. See *California Tribal Chairman's Ass'n*, 730 F.2d at 1291; *Atlantic County*, 715 F.2d at 837; see also *Bell*, slip op. 6-7 n.5, 9 n.8. In fact, the language of Section 602(b) of CETA itself refutes petitioners' argument because it specifically states, after providing for adjustments in payments on account of overpayment or underpayments, that the Secretary "may *also* withhold funds." 87 Stat. 878, 29 U.S.C. (1976 ed.) 962(b) (emphasis added). Plainly, therefore, withholding was not intended to be the sole remedy.[8]

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[8]Accordingly, withholding and repayment are complementary rather than "redundant" remedies, as petitioners argue (Pet. 11-13). The Secretary, in his discretion, may use either recovery method in appropriate

In addition, withholding might not always result in recovery by the government of all misused funds. Cf. *Bell*, slip op. 6-7 n.5, 9 n.8. Because withholding applies to future funds, it allows full recovery only where the recipient's grant continues and where there are sufficient funds remaining in the grant to cover the misspent funds. Withholding is, in fact, totally ineffectual in egregious cases of misspending in which the Secretary, after determining that the grantee could no longer be entrusted with the responsibility of administering a CETA program, was required to revoke the grant (§ 108, 87 Stat. 847-848, 29 U.S.C. (1976 ed.) 818), and thus there were no future funds to be withheld. There is no basis in the statute to read it to bar repayment of the substantial amounts of misspent money that could be involved in such cases.[9]

b. Repayment authority under the CETA Act of 1973, as under the original ESEA Act, is fully consistent with congressional intent. Both the contemporaneous and subsequent legislative history of the 1973 CETA Act show that Congress intended the Secretary to be able to seek repayment of misspent funds. During the initial consideration of CETA, Congress expressed great concern about federal

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circumstances. The approval of withholding as a remedy, in the instances cited by petitioners (Pet. 17-18, 21), in no way indicates that repayment was not also available. We further note that nothing in ESEA's statutory language supports petitioners' assertion (Pet. 12) that, unlike the Secretary of Labor under Section 602(b) of CETA, the Secretary of Education lacks authority to withhold funds to recover misexpenditures under Section 210 of ESEA.

[9]Thus, petitioners' argument (Pet. 9) is erroneous that the CETA regulations (29 C.F.R. 98.15 (1976)), by requiring a grantee whose funds have been withheld to continue to operate its program as specified in the applicable plan, would satisfy this Court's concern in *Bell* that the government be able fully to recover misspent funds. Because of the nature of withholding, full recovery is not assured even with CETA's maintenance-of-service regulation.

supervision and grantee accountability, and it indicated that it expected the Secretary to protect federal monies by recovering misspent funds. See H.R. Rep. 93-659, *supra*, at 8; 119 Cong. Rec. 25709 (1973) (statement of Sen. Javits); *id.* at 42877 (statement of Rep. Perkins). Thus, in enacting CETA, as in passing ESEA, Congress manifested "a concern and a desire to hold the States accountable in every way possible" (*Bell*, slip op. 9 n.9).

In the 1978 CETA Amendments, Congress reconfirmed the Secretary's repayment authority. In expressly providing that the Secretary could order repayment of misspent CETA funds (§ 2, 92 Stat. 1927, 29 U.S.C. (Supp. V 1981) 816(d)(1) and (2) (see page 2 & note 2, *supra*)), Congress sought to clarify the Secretary's existing repayment authority. See *California Tribal Chairman's Ass'n*, 730 F.2d at 1291; *Atlantic County*, 715 F.2d at 836. Moreover, in the 1978 debates, Congress acknowledged that the Secretary had been directly recovering misspent grant funds during the previous years. Rather than criticizing this exercise of the Secretary's authority or suggesting it was ultra vires, Congress expressed frustration that the agency had not collected *more* funds that were improperly spent. See 124 Cong. Rec. 25168 (1978) (statement of Rep. Hawkins); *id.* at 25221 (statement of Rep. Cornell); *id.* at 31021 (statement of Rep. Maguire); *id.* at 31026 (statement of Rep. Collins); *id.* at 27789 (statement of Sen. Bellmon).[10] Thus,

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[10]Extensive congressional oversight hearings were held in 1978 on the Department of Labor's monitoring of CETA programs. These hearings contain a number of specific references to the Department's efforts to recover misspent CETA funds. *Department of Labor Monitoring of Manpower Programs for the Hard to Employ: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 762-779 (1978). Department officials emphasized that efforts directly to recover improperly expended funds, as an alternative to withholding future funding, represented the "much more aggressive" practice of that administration (*id.* at 774).

in 1978, Congress specifically and deliberately embraced the Secretary's interpretation of the 1973 Act. As in *Bell* (slip op. 10-12, 15-16), these subsequent legislative developments lend strong support to the Secretary's repayment authority under the original CETA Act. See also *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969).[11]

c. Under CETA, as under ESEA (*Bell*, slip op. 12-13), the administering agency has interpreted the statutory language to authorize repayment. See *California Tribal Chairman's Ass'n*, 730 F.2d at 1291; *Atlantic County*, 715 F.2d at 836. This interpretation of the statute by the agency charged with its implementation is entitled to great weight. See *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-7, 27-28; *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 522 n.12 (1982); *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977).

Moreover, as the court below recognized (Pet. App. A58, quoting *Atlantic County*, 715 F.2d at 836), there is more in this case " 'than the "long held" view of an agency which the

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[11] Petitioners rely (Pet. 19) on a colloquy in the 1978 debates in which Senator Schweiker stated that Section 106(d)(2) of the amended Act (§ 2, 92 Stat. 1927, 29 U.S.C. (Supp. V 1981) 816(d)(2) (see page 11, *supra*)), would have no retroactive application. However, this floor debate addressed only Section 106(d)(2), an amendment to require *mandatory* termination or suspension of financial assistance and repayment of misspent funds for violations of, inter alia, certain *new* provisions of the Act. This Section was intended to require a more severe remedy for particular abuses in public service employment programs than that provided in Section 106(d)(1), in which the Secretary was authorized (but not required) to recover misspent funds for failure to comply with any provision of CETA. The legislative history does not suggest that the authority to seek repayment of misspent funds was new or should have only prospective application. Representative Butler's statement concerning existing penalties, which petitioners cite (Pet. 19), similarly was made in the context of the new mandatory payback authority in Section 106(d)(2). See 124 Cong. Rec. 25180, 25221-25222 (1978) (statements of Rep. Cornell and Rep. Butler).

Bell [C]ourt found persuasive.' " CETA replaced a number of earlier manpower statutes[12] that sought to achieve goals similar to CETA and that, like CETA, did not include express language on repayment. Nevertheless, under those statutes, the Secretary of Labor had routinely audited grantees and contractors, disallowed costs, and recovered misspent funds. See *Atlantic County*, 715 F.2d at 836 (citing administrative cases). In fact, as the court in *Atlantic County* noted (*ibid.*), Section 602(b) of CETA "echoes" the language of two of the predecessor statutes, Section 12(e) of the Emergency Employment Act of 1971, Pub. L. No. 92-54, 85 Stat. 154, 42 U.S.C. (Supp. II 1972) 4881(e), and Section 602(n) of the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 530, 42 U.S.C. (1976 ed.) 2942(n). Given this administrative practice, Congress's failure in passing CETA to indicate any disapproval of the Secretary's repayment authority under the predecessor statutes — and especially since it was largely retaining the relevant statutory languge — is persuasive evidence that Congress agreed with and ratified the Secretary's position. See *Atlantic County*, 715 F.2d at 836; *Texarkana Metropolitan Area Manpower Consortium*, 721 F.2d at 1164; see generally *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Gullet Gin Co.*, 340 U.S. 361, 366 (1951).[13]

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[12]Manpower Development and Training Act of 1962, Pub. L. No. 87-415, 76 Stat. 23, 42 U.S.C. (1970 ed.) 2571 *et seq.*; Title I of the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508, 42 U.S.C. (1976 ed.) 2701 *et seq.*; and the Emergency Employment Act of 1971, Pub. L. No. 92-54, 85 Stat. 146, 42 U.S.C. (Supp. II 1972) 4871 *et seq.*

[13]Petitioners' analysis of the predecessor manpower statutes (Pet. 14-17) is erroneous. The court of appeals correctly determined that none of the pre-existing laws expressly included "repayment" language (Pet. App. A59). The language in the Manpower Development and Training Act cited by petitioners (Pet. 14-15) does not mention repayment but simply refers to "protect[ion] * * * against loss." Moreover,

2. Petitioners argue (Pet. 22-25) that the language authorizing repayment in the 1973 CETA Act does not satisfy the standard of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), that conditions in federal grants to states be unambiguously expressed. This Court in *Bell*, however, held (slip op. 16 n.17) that substantially identical language authorizing recovery under ESEA "meets *Pennhurst*'s requirement of legislative clarity." In addition, the Court explained (*ibid.*) that "*Pennhurst* arose in the context of imposing an unexpected condition for compliance — a new obligation for participating States — while here our concern is with the remedies available against a noncomplying State." As the court below held (Pet. App. A59), the *Pennhurst* test is likewise met here. See also *California Tribal Chairman's Ass'n*, 730 F.2d at 1291-1292.[14]

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the provision in the Economic Opportunity Act, as amended, cited by petitioners (Pet. 14), which does authorize "recovery of funds," applies solely to Title II Urban and Rural Community Action Programs, not Title I manpower programs. Pub. L. No. 90-222, § 104, 81 Stat. 706, 42 U.S.C. (1976 ed.) 2835(c). Finally, assuming legislative intent can be deduced from Congress's failure to enact the Manpower Revenue-Sharing Act of 1971, no inference of opposition to an administrative repayment procedure can be drawn here. The provision in that bill relied upon by petitioners (Pet. 15) would have authorized the Attorney General to institute a civil action in appropriate cases. *Proposed Manpower Revenue-Sharing Act of 1971* § 105(a)(1), *reprinted in U.S. Dep't of Labor, Manpower Report of the President* 190 (1971). This provision thus implements the government's generally recognized right to enforce the terms of its agreements in a court of competent jurisdiction. See *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151 (1956). It does not address the authority under CETA, at issue in this case, to seek administrative repayment.

[14]We also point out that the financial obligations sought to be imposed upon the state in *Pennhurst* were largely indeterminate and could well have exceeded the federal funds that the state had received (451 U.S. at 24-25). Here, in contrast, petitioners are being asked to do no more than repay the portion of the federal grant that was improperly spent. As this Court recently noted, "[p]rotection of the public fisc

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1984

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requires that those who seek public funds act with scrupulous regard for the requirements of the law; [petitioners] could expect no less than to be held to the most demanding standards in [their] quest for public funds." *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 11.

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